EXTRATERRITORIAL JURISDICTION

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Notice

This Working Paper presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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Foreword

In our Report entitled *Our Criminal Law* we dealt with the "ambit of the criminal law" in the sense of *what* conduct should be classified as "criminal." In the present Paper we examine another dimension of the ambit of the criminal law, namely: *Where* and under what conditions should "criminal" conduct, particularly conduct outside Canada, be governed by *Canadian* criminal law? In other words: What is the geographical extent of the applicability of Canadian criminal law? What should it be?

We also examine the concomitant matter of the extent of the jurisdiction of Canadian criminal courts to try persons for offences committed in Canada and in whole or in part outside Canada.

More particularly, with a view to drafting jurisdictional provisions for a new *Criminal Code* that will be in accord with international law, this Paper canvasses the territorial and extraterritorial provisions of the *Criminal Code*, points up its defects, makes tentative recommendations and presents tentative draft legislation. The Paper focuses on the compatibility or incompatibility of the *Criminal Code*, particularly its offence-creating sections and jurisdiction sections, with principles of international law. The offence-creating and jurisdiction provisions of a few other federal Acts are also examined including the *Canada Shipping Act*, the *Maritime Code*, the *War Crimes Act*, the *National Defence Act*, and the *Extradition Act*.

This Paper represents the culmination of extensive study and research on the topic by the Commission and its consultants from time to time over the last ten years. Indeed, many of the issues in question were discussed in earlier unpublished research papers that were prepared for the Commission, namely:

- *Criminal Enactment Jurisdiction: Transnational Problems* by Professor Toni Pickard of Queen's University — July, 1974;
- *The Ambit of Criminal Law* by Professor Gerald Vincent LaForest (as he then was) in May, 1980 (now Mr. Justice LaForest of the Court of Appeal of New Brunswick); and
- *Territoriality and Extraterritoriality — Some Comments on the Ambit of the Criminal Law of Canada* — a Paper by Phillip Morris in June, 1981.

Professor Patrick Fitzgerald, who was a Co-ordinator in the Criminal Law Project when this Paper was commenced in 1982, provided initial thoughts and guidance that assisted in getting it under way and in shaping its overall approach.

By its very nature, the subject of this Paper involves not only matters of justice and legal ethics, but also of policy concerning international and domestic practice. Accordingly, an early draft was discussed with legal personnel not only in the federal Department of Justice and the Ministry of the Solicitor General, but also in the Departments of External Affairs, Fisheries, National Defence and Transport. It was also the subject of consultations with representatives of the Canadian Association of Chiefs of Police, the Canadian Association of Law Teachers, the Canadian Bar Association, the Advisory Panel of Judges, and the federal and provincial Government Consultation Group. In addition, it was specially reviewed at the Commission's request by Professor J. G. Castel, Q.C. While we are most grateful to all the above for their useful comments and constructive suggestions, the opinions and recommendations expressed in the Paper are, of course, solely the responsibility of this Commission.

In view of the complexity and length of the Paper it may be useful to mention here, at the outset, that the Paper examines the present law in the following sequence:

PART ONE — offences committed wholly in Canada,
PART TWO — offences committed wholly outside Canada,
PART THREE — offences committed partly in Canada and partly outside Canada,
PART FOUR — inchoate offences such as conspiracies and attempts committed anywhere,
PART FIVE — diplomatic immunity, armed forces, extradition/rendition, and double jeopardy.

Relevant recommendations are made in each Part.

Part Six, Chapter Sixteen reflects the end result of this Paper: it proposes a reformulation of the jurisdictional provisions of the *Criminal Code*.

Part Six, Chapter Seventeen is a summary of our recommendations, and Chapter Eighteen contains our suggested draft legislation to implement many of the recommendations.

Introduction and Principles

I. General

A. Difference between "Applicability of Law" and "Jurisdiction of Courts"

When elements of a civil (non-criminal) case arise in more than one state, private international law (conflict of laws) clearly differentiates between:

(a) the matter of which state's substantive law is applicable, and

(b) the matter of which state's courts have jurisdiction to try the case.

(Usually the two matters are determined in reverse order.)

In such cases, the civil law of one state is often applied by the courts of another state; for example, if a Belgian corporation with assets in Ontario is sued in an Ontario court for enforcement of a contractual obligation, the Ontario court may exercise jurisdiction and may apply the law of Belgium.

In criminal law, in cases that involve elements affecting more than one state the same two questions arise: (a) which state's substantive criminal law applies, and (b) do the courts of that state have jurisdiction to try the case?

While the same two questions arise in civil and criminal cases, the same answers may cause quite different results, for it is a well-established principle that the courts of one state will *not enforce the criminal law* of other states.[1]

To put it another way, if a court decides that its own state's criminal law is not applicable in a case before it, then it will not try the case. Hence it may be said that the choice of criminal law is conclusive as to jurisdiction. Nevertheless it is important, in considering the extraterritoriality of our criminal law, to bear in mind the difference between the "applicability of law" on the one hand, and "jurisdiction of courts" on the other, because both must be provided for in our legislation if criminal conduct outside Canada is to be punishable by a court in Canada. As Glanville Williams put it (albeit in respect of summary offences under English law):

> ... it is still theoretically possible that a statute may declare an act committed somewhere in the world to be criminal, and yet that no magistrates' court (or any other court) has power to try it. The draftsman of a statute attaching extraterritorial effect to a summary offence must remember to give jurisdiction to some magistrate's court.[2]

As we will see, the same may be said of summary conviction *and* indictable offences under Canadian law.

We have decided therefore to address in this Paper both the "applicability" of Canadian criminal law and the "jurisdiction" of Canadian criminal courts.

The term "jurisdiction" is commonly used in several different senses in connection with criminal law; for example, it is used in the sense of legislative power to enact criminal laws — substantive and procedural; in the sense of executive power to enforce criminal laws; and in a judicial sense. Internationally, it is used in the sense of the sovereign power of one state *vis-à-vis* other states to make, apply and enforce its criminal law. To avoid confusion, we will use the term "jurisdiction" in this Paper in the sense only of the power of a court to try a person for a criminal offence.

This Paper is not intended to deal with the allocation of jurisdiction *among* Canadian criminal courts, that is, "venue," for as Lord Halsbury said:

> No two questions can be more distinct than the question whether a matter is in the jurisdiction of the English courts at all, and whether a matter undoubtedly within the jurisdiction of the (English) courts shall be assigned for trial to particular courts in England.[3]

However, we felt that the somewhat confusing "jurisdictional" (but really "venue") provisions of the *Canada Shipping Act*[4] (sections 681 and 682) called for comment (in Chapter Four), as did the intermingling of venue and extraterritorial jurisdiction provisions in section 6 of the *Criminal Code*[5] dealing with aircraft offences. (See latter part of Chapter Five.) Also, in searching for statutory authority for Canadian courts to exercise jurisdiction over persons accused of having committed certain *Criminal Code* offences outside Canada, we found it necessary to mention some clearly "venue" sections of the *Criminal Code*. (See Chapters Seven and Sixteen.)

B. Statutes Examined

Although the *Criminal Code* contains the main body of the criminal law of Canada, there are, of course, many other Canadian federal Acts and regulations that make or implement criminal law. All of them should be examined for extraterritorial applicability; however, we must leave the bulk of that work to others. What we have done is to include in this review of the present law relevant provisions of the *Criminal Code* and of some other federal statutes that extend our criminal law to various places, people and conduct outside Canada, including:

(a) The *National Defence Act*,[6] paragraph 120(1)(*b*) of which *expressly* incorporates the offence provisions of the *Criminal Code* and other Acts of the Parliament of Canada and makes those provisions applicable to certain classes of people outside Canada (for example, members of the Canadian Forces, and dependants and other civilians accompanying the Forces);

(b) The *Canada Shipping Act*,[7] subsection 683(1) of which possibly *implicitly* makes the offence provisions of the *Criminal Code* and other Acts of Parliament of Canada applicable to certain classes of people outside Canada (for example, British subjects domiciled in Canada);

(c) The *Official Secrets Act*[8] and the *Foreign Enlistment Act*[9] which contain provisions that create particular criminal offences and make those provisions applicable to certain classes of people outside Canada, for example, "Canadian citizens" (paragraph 13(*a*) of the *Official Secrets Act*) and "Canadian nationals" (section 3 of the *Foreign Enlistment Act*); and

(d) The *Geneva Conventions Act*,[10] section 3 of which creates particular offences and is applicable to anyone outside Canada.

C. Objective

The main objective of this Paper is to contribute to the development of a *Criminal Code* that will, among other things, clearly:

(a) state the principles that govern the extent of applicability of our criminal law and the jurisdiction of our criminal courts;

(b) identify the Canadian territory in which our criminal law is applicable;[11] and

(c) specify those acts or omissions that take place outside Canada, or partly within and partly outside Canada, that are offences under Canadian criminal law for which the offender can be prosecuted in Canada.

D. Other Considerations

(1) Possible Study Approaches

This Paper, of the applicability of Canadian criminal law and jurisdiction of Canadian criminal courts, could reasonably be approached from any one of the following standpoints:

(a) the status of the accused or the victim such as whether he or she is a citizen, national, alien, resident, tourist, member of a visiting military force, or diplomat;

(b) the offence involved;

(c) the thing on, or in respect of which, the offence was committed, for example, a ship, aircraft, lighthouse or oil rig;

(d) the principle of international law involved; that is, territoriality, nationality, protective, universality, or passive personality (nationality of the victim); or

(e) the geographic area of the world in which the offence was committed.

(2) Scope and Sequence of Review

Since the main purpose of this Paper is to examine the applicability of the criminal law of Canada to conduct of people outside Canada, and since the main criterion of international law in respect of the applicability of criminal law in various parts of the world is territoriality, we think it best to structure our analysis of the present Canadian law by reference to the territory where the offence was committed. We will therefore examine the present law in the following sequence:

PART ONE — offences committed wholly in Canada,

PART TWO — offences committed wholly outside Canada, and

PART THREE — offences committed partly within and partly outside Canada.

Inchoate offences such as "attempts" could, of course, logically be discussed under all of the three mentioned classifications of offences. However, we believe that a more coherent discussion results from discussing inchoate offences separately in Part Four.

In connection with the applicability of Canadian criminal law in Canada, we will specifically look at what comprises Canadian territory — including the territorial sea of Canada.

Our examination of the subject of offences committed wholly *outside* Canada will be done in the following sequence:

(a) offences committed in quasi-Canadian territory, that is, in Canadian fishing zones, exclusive economic zones or over the continental shelf,

(b) offences committed on or near artificial islands, installations and structures at sea,

(c) offences committed on ships,

(d) offences committed on aircraft,

(e) offences committed in other countries by
  - representatives of Canada
  - Canadian citizens
  - anyone.

In Part Three we discuss *transnational offences*, that is, those committed partly in Canada and partly outside Canada.

In Part Four we discuss *inchoate offences* such as attempts and conspiracies.

In Part Five we look at the following aspects of jurisdiction of Canadian criminal courts: immunities, extradition, and international "double jeopardy" including the extent to which pleas of *autrefois acquit* or *autrefois convict* founded on acquittal or conviction outside Canada are or should be bars to the exercise of jurisdiction by criminal courts in Canada.

In each chapter, we cover the following aspects of applicable law, although not necessarily in the same order: (a) international law, (b) Canadian law, (c) policy considerations, (d) defects in present Canadian law, and (e) tentative recommendations for change. Where necessary we will include in each chapter similar coverage on the matter of jurisdiction of Canadian courts to try relevant offences.

In Part Six, Chapter Sixteen, we present an outline of our proposed jurisdictional provisions for the General Part of the *Criminal Code* and also draft legislative provisions for the Special Part of the *Criminal Code* and several other Acts of Parliament.

In Part Six, Chapter Seventeen, we have gathered together all the recommendations that we have made in other parts of the Paper.

II. Principles of International Law

Ronald St J. Macdonald when he was Dean of the Faculty of Law at Dalhousie University wrote in 1974:

> ... [T]here is a need to ensure that the municipal order in Canada conforms to the requirements of international law and organization and that Canadian processes and procedures for giving effect to international obligations, customary as well as conventional, are efficient, effective, and reasonably well-known. Like every other member state of the international community, Canada has a duty to carry out in good faith its obligations arising from treaties and other sources of international law. It is widely accepted practice and doctrine that a state cannot successfully offer its own internal arrangements as a reason for failing to perform this duty.... It follows, therefore, that there is value in continuing to review and appraise the processes and structures that pertain to the internal application of international law in Canada, especially at a time of reconsideration and readjustment in the federal system itself. Conflicts between international law and Canadian law are less likely to occur when the relationship question is clearly articulated.[12]

It follows that Canadian legislative provisions governing (a) the applicability of Canadian criminal law in and outside Canada, and (b) the jurisdiction of Canadian courts to try offences committed in or outside Canada, should be consistent with the following principles of public international law (which are not mentioned in the *Criminal Code*) governing the division of criminal powers among sovereign states and the jurisdiction of their courts.[13]

A. Territorial Principle

Acts or omissions that are committed *on the territory of a state* or in the airspace above it by anyone are subject to the criminal law of that state and to the jurisdiction of the courts of that state. This "territorial principle" of international law is universally recognized. To deal with offences committed partly in more than one state, or offences that, although wholly committed in one state cause substantial direct harmful effects in another state, international law has expanded the territorial principle to include the *subjective territorial principle* and the *objective territorial principle* respectively.

The *subjective territorial principle* provides for jurisdiction over crimes in which a material element has occurred within the territory of the *forum* state.[14] Thus the U.S. *Model Penal Code* would give a state's courts jurisdiction to try an offence under the subjective territorial principle if "... either the conduct which is an element of the offence or the result which is such an element occurs within this [*sic*] state."[15]

The *objective territorial principle* provides *forum* jurisdiction over crimes which, although committed by conduct wholly outside the territory of the *forum* state, caused substantial direct harmful effects on persons or property in the territory of the *forum* state. The *objective territorial principle* is often explained as being more restrictive in scope; that is, as only being the basis of criminal jurisdiction for courts in the state in which an otherwise extraterritorial offence was "consumated" or "terminated."[16] However, there seems to be little doubt that it is a valid basis for a state to confer criminal jurisdiction on its courts to try extraterritorial offences such as conduct crimes (as opposed to *result* crimes) that have been completed extraterritorially but have caused substantial direct harmful effects in that state.[17] This matter, in terms of *conduct* crimes and *result* crimes, is discussed further in Part Three of this Paper.

B. Nationality Principle

The "nationality principle" of international law recognizes the right of a state to apply its criminal law to its citizens, nationals, or other persons owing allegiance to it, in respect of their conduct anywhere in the world, and recognizes the power of its courts to exercise criminal jurisdiction over such conduct. In other words, a citizen of State A may be charged under the laws of State A for an offence committed in State B, and he may be tried in State A for that offence committed in State B. Many states apply this principle extensively.[18] Canada does so sparingly (see Chapter Seven). Even with the advent of the principle of "reasonableness" which, as explained later in this chapter, curtails the traditional justification for the exercise of jurisdiction based solely on the nationality of the accused, Canada could make more extensive use of the nationality principle.

C. Other Principles

There are three other principles of international law under which each state has a right to apply its criminal law to certain conduct of aliens outside the territory of the state. They are:

> the "protective principle" under which offences against the security, currency, seals, stamps, passports and similar public documents of a state committed anywhere by anyone may be made subject to the criminal law of that state and to the jurisdiction of the courts of that state;
>
> the "universality principle" under which certain conduct constitutes specific universally recognized offences such as piracy or war crimes that may be tried by the courts of any state regardless of where committed; and

> the "passive personality principle" under which offences by anyone, anywhere, against a national of a state may be made subject to the criminal law of that state and to the jurisdiction of the courts of that state — at least in situations where the criminal law of no other state would be applicable.[19]

While at first glance it may appear that the adoption of all these principles would cause impossible jurisdictional overlaps and conflicts of laws, it will be seen on closer examination that since the protective and universality principles are limited to relatively few types of offences, and since the passive personality principle is essentially only a criterion where no other state can or will assert jurisdiction, it is really only when the nationality principle or objective territorial principle is asserted in respect of an offence committed in the territory of another state that duplicity of jurisdiction is likely to arise. However, even then, the fact that the accused, witnesses and evidence are usually all, or mostly, in only one of the countries concerned, and the fact that extradition treaties and laws against double jeopardy usually come into play, render it unlikely that an offender will suffer double jeopardy from the simultaneous operating of the principles of territoriality and nationality. Furthermore, as mentioned in the 1982 draft *Restatement of United States Foreign Relations Law*,[20] in determining the supremacy of the competing principles of territoriality and nationality in a given case:

> ... rigid concepts have been displaced by broader criteria embracing principles of *reasonableness* and fairness in accommodating overlapping or conflicting interests of States.[...] This means that courts ... learning from the approach to comparable problems in private international law, are increasingly inclined to analyze various interests, examine contacts and links, give effect to justified expectations, search for the "centre of gravity" of a given situation and develop priorities [Emphasis added]

rather than slavishly using one of the traditional principles (for example, the nationality principle) alone as justifying the exercise of jurisdiction over an extraterritorial offence.

In practice, most states fully apply the territorial principle but apply the other principles sparingly.

PART ONE:

OFFENCES COMMITTED WHOLLY IN CANADA

CHAPTER ONE

The General Rule — Territoriality

There is no doubt that under the territorial principle of international law mentioned in our section on principles, a state may apply its criminal law to the conduct of persons on, under or over the territory of the state regardless of the nationality of the offender.

The general rule as to the ambit or scope of the applicability of Canadian criminal law has two parts. The first part is that, generally speaking, our criminal law applies to the conduct of everyone *in* Canada, be he or she citizen, alien, resident or tourist; for example, if a tourist from another country steals money while visiting Canada he commits an offence under the *Criminal Code* of Canada. The other part is that although section 3 of the *Statute of Westminster 1931* clearly empowers the Parliament of Canada to "make laws having extraterritorial operation," our criminal law does not generally apply to conduct of people *outside* Canada; for example, a Canadian citizen who steals money in Paris, France, commits an offence against the criminal law of France, but probably not against the criminal law of Canada.

The general rule is derived from English common law. As Lord Reid said:

> It has been recognised from time immemorial that there is a strong presumption that when Parliament, in an Act applying to England, creates an offence by making certain acts punishable it does not intend this to apply to any act done by anyone in any country other than England. Parliament, being sovereign, is fully entitled to make an enactment on a wider basis. But the presumption is well known to draftsmen, and where there is an intention to make an English Act or part of such an Act apply to acts done outside England that intention is and must be made clear in the Act.[21]

In international law the two parts of the general rule are referred to jointly as the territorial principle; a principle that has grown naturally from the concept of the independence of each sovereign state in governing its internal affairs.

As in English legislation, the general rule, that is, the territorial principle, is not stated expressly in Canadian legislation.[22] But it is implicit in the way in which the offence-creating sections of the *Criminal Code* and of other criminal enactments of Canada are drafted; that is, no mention is made in an offence-creating section as to the *locus* of the conduct unless the section is to be applicable to conduct outside Canada,[23] and in that event, the section expressly says so. For example, compare sections 218 and 58 of the *Criminal Code* which read in part:

> **218.** (1) Every one who commits first degree murder or second degree murder is guilty of an indictable offence and shall be sentenced to imprisonment for life.
>
> **58.** (1) Every one who, *while in or out of Canada*, (*a*) forges a passport ...
>
> is guilty of an indictable offence and is liable to imprisonment for fourteen years. [Emphasis added]

Thus, it is not an offence under section 218 to commit murder outside Canada, but it is an offence under section 58 to forge a (Canadian) passport outside Canada.

Although the constitution, maintenance, and organization of provincial courts of criminal jurisdiction falls within the exclusive jurisdiction of the (provincial) legislature (section 92(14) of the *British North America Act*, 1867), only Parliament can confer criminal jurisdiction on these provincial courts.[24]

With respect to the extraterritorial jurisdiction of courts of criminal jurisdiction, Parliament enacted in subsection 5(2) of the *Criminal Code* that:

> Subject to this Act or any other Act of the Parliament of Canada, no person shall be convicted in Canada for an offence committed outside of Canada.

The *Criminal Code* exceptions to the territorial limitation are relatively few. They appear in the following sections of the *Code*: 6(1) and (1.1) — offences on or in respect of certain aircraft; 6(1.2) — offences against internationally protected persons; 6(2) — offences by Canadian public servants; 46(3) — treason; 58 — forging or uttering a Canadian passport; 59 — fraudulent use of Certificate of Canadian Citizenship; 75 — piracy; 76 — piratical acts; 254 — bigamy; and 423(4) — conspiracy. (Copies of these provisions are included in Appendix A to this Paper.)

The exceptions to the territorial principle to be found in the offence-creating sections of other Acts of the Parliament of Canada seem also to be relatively few but perhaps there are more such Acts than one would think. They would include the Acts mentioned under the heading "Statutes Examined" in the Introduction of this Paper and also Acts applicable in particular waters outside Canada proper, such as the *Fisheries Act*,[25] and *Coastal Fisheries Protection Act*.[26]

In our view Canada should continue to base the applicability of its criminal law and the jurisdiction of its criminal courts on the territorial principle augmented to a limited extent by other principles of public international law or international conventions. Since the territorial principle applicable to offences committed *wholly* in a state is universally recognized, it is the principle least likely to give rise to international objection; also, it reduces to a minimum the possibility of conflict between our criminal laws and those of other states. Furthermore, as indicated above, there are relatively few extraterritorial offences that are punishable by Canadian courts and, as will be seen below, we are not recommending significant change in this respect. However, certain omissions and defects that we find in the Canadian statutory expression and implementation of the territorial principle and (exceptionally) the other international principles, cause us concern, including the absence in the *Criminal Code* of mention of the principles on which the extraterritorial applicability of our criminal law is based.

RECOMMENDATION

1. That the General Part of the *Criminal Code* explain briefly the international law principles of criminal law and jurisdiction as recognized by Canada, and state that, subject to relatively few statutory exceptions, the basis of Canadian criminal law and jurisdiction of Canadian courts is the territorial principle.

I. Definition of Canadian Territory

Although Canadian criminal law is generally applicable only to offences committed in Canada, the territorial limits of Canada have not been defined for general criminal law purposes. Obviously if we are to speak of offences "in Canada" or "outside Canada" there should be certainty as to what territory (including air and water) comprises "Canada."

Neither the *Criminal Code* nor any other federal Canadian statute defines the territory of the Canadian Arctic for the purposes of the general application of Canadian criminal law.[27] While it is not for this Commission to suggest what should be the territorial limits of the Canadian Arctic, any more than what should be the territorial limits of any province, we observe that the absence of such a definition has given rise to questions as to the applicability of criminal law and the jurisdiction of Canadian courts under national and international law.[28]

It would therefore be preferable if the international boundaries of the Canadian Arctic were defined by statute for criminal law purposes in the *Criminal Code*. Having said that, we must add that we appreciate that policy and political implications and other considerations may dictate otherwise. Other considerations would include differences in the international legal status of shelf ice, fast ice, pack ice, ice islands, icebergs and ice floes in the Arctic.[29]

II. Territorial Sea

The *United Nations Convention on the Law of the Sea*, which was signed by 118 countries in December 1982,[30] generally speaking represents a codification of customary international law. At least that is probably true of many of its provisions including Articles 2, 3 and 4, which read:

> Article 2
>
> 1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic state, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
> 2. This sovereignty extends to the airspace over the territorial sea as well as to its bed and subsoil.
> 3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.
>
> Article 3
>
> Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.
>
> Article 4
>
> The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

Parliament has provided for the legal description and positioning of the baselines from which to measure the breadth of the territorial sea of Canada by enacting section 3 of the *Territorial Sea and Fishing Zones Act*[31] which reads:

> 3. (1) Subject to any exceptions under section 5, the territorial sea of Canada comprises those areas of the sea having, as their inner limits, the baselines described in section 5 and, as their outer limits, lines measured seaward and equidistant from such baselines so that each point of the outer limit line of the territorial sea is distant twelve nautical miles from the nearest point of the baseline.
>
> (2) The internal waters of Canada include any areas of the sea that are on the landward side of the baselines of the territorial sea of Canada.

The *Criminal Code* section 433 deals with offences on the territorial sea of Canada as follows:

> (1) Where an offence is committed by a person, whether or not he is a Canadian citizen, on the territorial sea of Canada or on internal waters between the territorial sea and the coast of Canada, whether or not it was committed on board or by means of a Canadian ship, the offence is within the competence of and shall be tried by the court having jurisdiction in respect of similar offences in the territorial division nearest to the place where the offence was committed, and shall be tried in the same manner as if the offence has been committed within that territorial division.
>
> (2) No proceedings for an offence to which subsection (1) applies other than an offence for which the accused is punishable on summary conviction shall, where the accused is not a Canadian citizen, be instituted without the consent of the Attorney General of Canada.

Thus section 433 confers jurisdiction on criminal courts in Canada to try offences committed on the internal waters or territorial sea in Canada. But what offences? Nowhere does the *Criminal Code* state that any or all *Criminal Code* offence sections apply in, on or over the internal waters and territorial sea of Canada. That there is a need to do so at least for the territorial sea would seem to have been established by an important decision of an English court over one hundred years ago. In that case, the court majority held that even though under international law British sovereignty extended over its territorial sea, its criminal law would not apply to foreigners in foreign ships there until Parliament so legislated.[32] The point is that it is not enough to have a statutory provision such as section 433 to prescribe the *jurisdiction* of courts in respect of conduct on the territorial sea; we also need a provision in the *Code* to extend the general *applicability of substantive Canadian criminal law* to the territorial sea of Canada. Otherwise, the words "an offence" as used in section 433 could well mean only one of the *extraterritorial* offences (such as piracy under section 75 of the *Criminal Code*, or an offence against one of the Fishing Acts) but not a non-extraterritorial offence such as murder by an alien in the territorial sea of Canada. The reason is that at common law the territorial sea is part of the high seas and not a part of the realm for criminal law purposes.

If there were in the *Criminal Code* a definition of Canada to include its internal waters and territorial sea, it would give a clearer meaning to the present section 7 of the *Code* which states in part that "the provisions of this Act apply throughout Canada...." An alternative would be to amend section 7. But even if section 7 were to be amended so that there would be no territorial limitation on the applicability of the offence-creating sections of the *Criminal Code*, the *jurisdiction* of Canadian criminal courts in most cases would still be determined by reference to whether the conduct of the accused occurred "in Canada" or "outside Canada" (for only in relatively few cases is there extraterritorial jurisdiction); and hence there would continue to be a need to define "Canada" for purposes of the *Criminal Code*.

RECOMMENDATION

2. That "Canada" be defined in the *Criminal Code* and that it be defined to include the Canadian Arctic, the internal waters of Canada and the territorial sea of Canada.

A. Territorial Sea — Jurisdiction

As previously mentioned, international law recognizes a state's right to confer jurisdiction on its courts to try criminal offences committed in its territorial sea.

If the *Criminal Code* were to be amended as we have suggested to make clear that Canadian criminal law does apply to our internal waters and territorial sea, a provision such as now exists in subsection 433(1) will, of course, still be required to assign jurisdiction to particular courts to try offences committed there. Jurisdiction over the *accused* would then be exercisable by those courts pursuant to section 428 but need it be qualified as in subsection 433(2)?

We feel that subsection 433(2) is defective in making a prosecution under subsection 433(1) conditional upon the consent of the Attorney General of Canada "where the accused is not a Canadian citizen"; we feel that the basis on which that consent is required should be changed.

While we appreciate that the prosecution of offences committed on board foreign ships in Canadian internal and territorial waters could give rise to delicate situations involving the Canadian government and foreign governments, and that therefore we should retain a statutory provision that certain prosecutions should not be undertaken without the consent of the Attorney General of Canada, nevertheless we feel that citizenship is not the proper criterion. Given that under international law Canada has sovereignty over its internal waters and territorial sea (albeit subject to the right of innocent passage of foreign ships), we feel that a prosecution for an offence alleged to have been committed by an alien in the internal waters or territorial sea of Canada should proceed subject only to the same conditions as would apply in respect of a prosecution of a similar offence alleged to have been committed by an alien on the mainland of Canada — except where the offence is committed on a ship registered in a state other than Canada.

As far as offences committed in the internal waters or territorial sea of Canada on board ships of non-Canadian registry are concerned, the concurrent applicability of the criminal law of the flag state (of the ship) and of the coastal state (Canada), and the possibility that inter-governmental discussions between the two states may be necessary to determine which state will primarily or exclusively exercise its criminal jurisdiction, make it reasonable that the Attorney General of Canada be consulted before prosecutions in Canada are commenced in such cases.[33] The same considerations do not apply in respect of offences committed by aliens or Canadian citizens in the internal waters or territorial sea of Canada *other than on board a ship of non-Canadian registry*, for example, on board a ship of Canadian registry, or while swimming off a beach.

RECOMMENDATION

3. That the provision that now appears as subsection 433(2) of the *Criminal Code* be amended so that the consent of the Attorney General of Canada to prosecute offences committed on or in the internal waters or the territorial sea of Canada is required only in respect of prosecutions of non-Canadians for indictable offences committed in or by means of a ship of non-Canadian registry.

B. Delineation of the Territorial Sea

We noted earlier that the delineation of our internal waters and territorial sea can be effected by the Governor in Council (under section 5 of the *Territorial Sea and Fishing Zones Act*)[34] by issuing lists of geographical co-ordinates from which baselines may be determined. Internal waters are those on the landward side of the baselines; the territorial sea extends twelve nautical miles seaward from the baselines.[35] In addition, the Minister of Energy, Mines and Resources may cause charts to be issued under section 6 of the *Act* delineating the territorial sea. Where this has been done, those charts are available to assist a court in determining whether or not the place where an offence has taken place is within the territorial sea of Canada and therefore within Canada.

Not all Canada's internal waters and territorial sea have been delineated under the *Territorial Sea and Fishing Zones Act*. Where they have not, the extent of these waters and sea is to be determined by reference to the baselines applicable before July 23, 1964.[36] What this really means is that courts may have to determine for themselves the positions of the baselines. A court may make its determination on the basis of legal precedents and evidence presented to it,[37] or, as in the English case of *The Fagernes*,[38] on a statement by a governmental authority. In that case, the Attorney General was asked by the court to declare whether or not the place in question was within the territorial limits of the Crown, and the Attorney General declared the view of the Home Secretary. In the English Court of Appeal two of the judges were of the opinion that the declaration was binding on the court because determination of national territory is a matter for the Executive, not the courts. The third judge, though concurring in the decision, looked upon the declaration merely as evidence to be considered by the courts.

There is little doubt that the delineation of Canadian national territory is a matter that is primarily the responsibility of the federal Parliament and government, involving, as it does, Canada's foreign policy and relations with other states. And certainly in similar matters, the court will seek the advice of the responsible department of the federal government; some examples are: (a) the recognition of foreign countries, (b) whether a state of war exists, and (c) the binding character of a treaty.[39]

The English Law Commission has expressed the opinion that it is inappropriate for government departments to determine whether the spot where a crime was committed falls within the territorial sea.[40]

The English Law Commission nonetheless felt that there was one piece of basic information which the government could appropriately supply as conclusive evidence, namely the position of the baselines from which the territorial sea is measured. This, as they note, is essentially a matter of measurement, and the government has the experts to do the job. We agree with this.

As far as Canada is concerned, it seems to us that our law is defective in not providing that where official charts have been issued under section 6 of the *Territorial Waters and Fishing Zones Act* delineating territorial waters, they are conclusive for trial purposes. This would be consistent with Article 16 of the 1968 *U.N. Convention on the Law of the Sea*. In the light of such charts, the courts should readily be able to decide whether the location of an alleged crime fell within the territorial waters of Canada.

RECOMMENDATIONS

4. That there be a statutory provision inserted in the *Criminal Code* stating that a chart issued by or under the authority of the Minister of Energy, Mines and Resources pursuant to section 6 of the *Territorial Sea and Fishing Zones Act* delineating the territorial sea is conclusive proof thereof.

5. That there also be a statutory provision, preferably in the *Criminal Code*, stating that in the absence of a chart having been issued (as mentioned in the immediately preceding paragraph) to cover the area in question, a declaration by the Secretary of State for External Affairs — as to whether or not a particular place is within or without the internal waters or territorial sea of Canada, or a fishing zone of Canada, or an exclusive economic zone of Canada, or over the continental shelf of Canada — is conclusive evidence of that fact.

We are not suggesting, however, that there be an obligation on government to supply such information. Where it can, of course, it should do so, for it is important that in matters of this kind the Executive and the courts speak with one voice. On the other hand, in some circumstances the Executive may not wish to pronounce itself; for example some territory claimed by Canada may be contested by other states, and inter-governmental negotiations may be adversely affected by a premature assertion. As the application of criminal law is only one of the matters to be taken into account in the demarcation of national territory, it may be unwise for a pronouncement to be forced by accident of litigation.

Regardless of the actual boundaries, however, for the sake of clarity, certainty and completeness we think it would be better if the General Part of the *Criminal Code* were not only to define "Canada" as including its internal waters and territorial sea for criminal law purposes, but also expressly to define the territorial sea of Canada.

RECOMMENDATION

6. That the *Criminal Code* define the territorial sea of Canada by referring to section 3 of the *Territorial Sea and Fishing Zones Act* and thereby give meaning

to the expression "internal waters" and "territorial sea" in section 433 of the *Criminal Code*.

Insofar as section 3 of the *Territorial Sea and Fishing Zones Act* itself is concerned, it appears to be defective in its wording in that it describes the *outer limits* of the Territorial Sea as "lines measured *seaward* ... from such baselines." [Emphasis added] The outer limits should, of course, be lines *parallel to the baselines*.

RECOMMENDATION

7. That section 3 of the *Territorial Sea and Fishing Zones Act* be amended to define the outer limits of the territorial sea as follows:

> **... as the outer limits, lines drawn parallel to and equidistant from such baselines so that each point on an outer-limit line is distant twelve nautical miles seaward from the nearest point of a baseline.**

PART TWO:

OFFENCES COMMITTED WHOLLY OUTSIDE CANADA

CHAPTER TWO

General Remarks

Why should Canadian criminal law be applied to the conduct of persons that occurs outside Canada? Why not leave juridical control of such conduct to civil law and, if applicable, to the criminal law of the country in which the conduct occurs?

In principle, that is the Canadian position. Our criminal law is not *generally* applicable to people, including Canadian citizens, in respect of their conduct outside Canada. There are exceptions: it is applicable in respect of (a) some particular offences committed by anyone outside Canada, for instance, fraudulent use of a Canadian passport; (b) particular people outside Canada, for example, public servants of Canada; and (c) a combination of particular offences by particular people, for example, treason by a Canadian citizen. To mention these examples is to state the obvious: that while normally it makes sense to rely on civil remedies and/or foreign criminal law to control conduct abroad, there is an obvious need for Canadian criminal law to apply to *some* people in respect of *some things* that they do outside Canada. The values which our criminal law underlines, particularly the security of our form of Government and its basic institutions, could not adequately be protected if relevant parts of our criminal law were not applicable outside Canada.

And so, it is not because we have any disagreement with, or criticisms of, the basic principles upon which the very limited applicability of Canadian criminal law to offences committed wholly outside Canada is founded that we have undertaken this review of it. Rather, what prompts us to undertake this review and study is omissions and imprecision in, and the scattered presentation of, Canadian statutory criminal law dealing with offences outside Canada and the jurisdiction of courts in Canada to try them. As we strive for simplicity, clarity, certainty and uniformity in legislative provisions creating criminal offences,[41] we should do no less in respect of legislative provisions (that we may call "applicability provisions") specifying where in the world those offence provisions are applicable and legislative provisions conferring trial jurisdiction on Canadian courts (that we may call "jurisdiction provisions''). For, although ''applicability provisions'' and ''jurisdiction provisions'' in criminal legislation do not ''create'' offences, those provisions obviously have as substantive an effect as the offence-creating provisions in respect of the freedom of the persons to whom the offence-creating provisions are thereby made applicable.

With a view to avoiding any misunderstanding as to what we mean by applicability of our criminal law abroad, it might be useful to note here that, although a state may enact that its criminal law be applicable in the territory of another state, a state does not have a right under international law to *enforce* its criminal law *in* the territory of other states either by means of its police power or by means of conducting criminal trials in the other states. In fact, in the absence of a permissive treaty or agreement it would be an infringement of sovereignty and contrary to international law to do so. Hence, except in respect of regulating the conduct of members of our military forces, our criminal law — even when *applicable* outside Canada — can generally only be *enforced* through Canadian courts exercising jurisdiction in Canada.[42]

CHAPTER THREE

Maritime Areas Adjacent to the Territorial Sea

Where there is a common geographic boundary between adjacent states, there is, under the Territorial Principle, an abrupt change from the criminal law of one state to that of the other as the boundary is crossed. For example, in crossing from Canada to the United States at Emerson, Manitoba, the criminal law changes suddenly from that of Canada to that of the state of North Dakota. This is not so in respect of oceanic coastal boundaries of a state such as Canada. Under international law there is a gradual rather than an abrupt cessation of the territorial applicability of the coastal state's criminal law as one leaves the state's land territory or internal waters and moves seaward through the territorial sea, fishing and other maritime zones, and then into the unzoned high seas, foreign maritime zones, foreign territorial sea and finally onto a foreign state's land territory.

We will commence our examination of Canadian criminal law applicable outside Canada by looking at maritime zones adjacent to the territorial sea of Canada. But before doing so we should note that, based on Admiralty law, the English criminal law applicable to offences at sea was restricted to offences *on board* ships. Any Canadian legislation should be drafted in a manner that will ensure its applicability to persons "in" the water as well (consistent, of course, with international law) so that persons violating Canadian laws applicable in maritime zones do not escape liability simply because they are "in" the water rather than "on" the water on board a ship, aircraft or structure.

International law on freedom of the seas outside the territorial seas is described in Articles 1 and 2 of the *Geneva Convention on the High Seas* dated 29 April 1958 which reads:[43]

> Article 1
>
> The term "high seas" means all parts of the sea that are not included in the territorial sea or in the internal waters of a state.

Article 2

> The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States:
>
> (1) Freedom of navigation;
>
> (2) Freedom of fishing;
>
> (3) Freedom to lay submarine cables and pipelines;
>
> (4) Freedom to fly over the high seas.
>
> These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

Notwithstanding the "freedom of the (high) seas," international law has long recognized zones in the high seas (contiguous to the territorial seas) in which the coastal state has the right to exercise some measure of control over the activities of its own people and those of other states. This control has traditionally been exercised for such purposes as defence, customs and sanitation. Indeed Article 24 of the 1958 *Geneva Convention on the Territorial Sea and Contiguous Zone*[44] gave clear recognition to that right. Canada has for many years acted on that basis.[45] Thus under the *Customs Act*, Canada defines Canadian customs waters to extend nine marine miles beyond the territorial sea.[46] In recent years, there has been a trend towards coastal states developing much more extensive particularized zones of interest, such as fishing and economic zones and, as in the case of customs, international law recognizes the right of the adjacent coastal state to enact prohibitions for the protection of these particular interests. In this connection, the 1982 *United Nations Convention on the Law of the Sea*[47] reads in part as follows:

Article 55

Specific legal régime of the exclusive economic zone

> The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal régime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

Article 56

Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

> 1. In the exclusive economic zone, the coastal State has:
>
> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; . . .

> Article 57
>
> *Breadth of the exclusive economic zone*
>
> The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

The exclusive economic zones will subsume the present fishing zones when a sufficient number of states ratify the 1982 *Convention* and thereby bring it into force. However, since that is unlikely to occur for a few years, we will here discuss the applicability of criminal law in terms of the fishing zones of Canada.

I. Fishing Zones (Exclusive Economic Zones)

Articles 6 and 7 of the *Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas*, dated 29 April 1958, read in part:[48]

> Article 6
>
> 1. A coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea.
>
> Article 7
>
> 1. Having regard to the provisions of paragraph 1 of article 6, any coastal State may, with a view to the maintenance of the productivity of the living resources of the sea, adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea, provided that negotiations to that effect with the other States concerned have not led to an agreement within six months.

Canada has established fishing zones extending up to 200 nautical miles beyond the baselines of our territorial sea,[49] in which it enforces a number of prohibitions regarding the taking of fish and marine life. Both the *Fisheries Act*[50] and the *Coastal Fisheries Protection Act*[51] define "Canadian fisheries waters" as "all waters in the fishing zones of Canada, all waters in the territorial sea of Canada and all internal waters of Canada." Sections 3, 7, 8 and 9 of the *Coastal Fisheries Protection Act* respectively prohibit certain activities, create offences, prescribe penalties, and confer trial jurisdiction on courts in Canada. They read in part:

> **3.** (1) No foreign fishing vessel shall enter Canadian fisheries waters for any purpose unless authorized by

(*a*) this Act or the regulations,

(*b*) any other law of Canada, or

(*c*) a treaty.

(2) No person, being aboard a foreign fishing vessel or being a member of the crew of or attached to or employed on a foreign fishing vessel shall in Canada or in Canadian fisheries waters

(*a*) fish or prepare to fish ... unless he is authorized to do so....

7. Every person is guilty of an offence who

(*a*) being master or in command of a fishing vessel,

(i) enters Canadian fisheries waters contrary to this Act, or

(ii) without legal excuse, the proof whereof shall lie on him, fails to bring to when required to do so by any protection officer or upon signal of a government vessel;

(*b*) being aboard a fishing vessel, refuses to answer any questions on oath put to him by a protection officer;

(*c*) after signal by a government vessel to bring to, throws overboard or staves or destroys any part of the vessel's cargo, outfit or equipment; or

(*d*) resists or wilfully obstructs any protection officer in the execution of his duty.

8. (1) Every person who violates any of the provisions of section 3 is guilty of an offence and is liable (to a fine or imprisonment or both).

9. All courts, justices of the peace and magistrates in Canada have the same jurisdiction with respect to offences under this Act as they have under sections 681 to 684 of the *Canada Shipping Act* with

> respect to offences under that Act, and the provisions of those sections apply to offences under this Act in the same manner and to the same extent as they apply to offences under the *Canada Shipping Act*.

Although those measures represent an extraterritorial extension of Canadian law, obviously they do not constitute a general extension of Canadian criminal law and jurisdiction; rather they are examples of the exercise of legislative power and jurisdiction in respect of particular matters as permitted under customary and conventional international law. Similar Canadian enactments of extraterritorial prohibitions in furtherance of specific international treaties include: the *North Pacific Fisheries Convention Act*,[52] the *Northern Pacific Halibut Fisheries Convention Act*,[53] the *Northwest Atlantic Fisheries Convention Act*,[54] and the *Pacific Salmon Fisheries Convention Act*.[55]

The enforcement of applicable fishing controls (including seal hunting regulations) under the *Fisheries Act*[56] in the 200 mile fishing zones of Canada, could give rise to incongruous situations because the *Criminal Code* in general does not apply in our fishing zones beyond our territorial sea. For example, were an over-zealous fishery officer to exceed his authority and unlawfully assault an innocent observer of the seal hunt, the officer could be convicted for assault under the *Criminal Code if the assault occurred in Canada* as happened in 1981 in Prince Edward Island.[57] However, if the assault occurred in a Canadian fishing zone beyond the twelve mile territorial sea it would seem that the fishery officer could not be convicted because the *Criminal Code* is not generally applicable there. In this connection it is interesting to note that subsection 6(2) of the *Criminal Code* would not be available as a basis of prosecution, even if the fishery officer were a federal public servant, since he would probably not have committed "an act ... in that place (outside Canada) that is an offence under the laws of *that place*."

Certainly Canada could justifiably, under the nationality principle of international law, legislate to apply Canadian criminal law to Canadian citizens in the fishing zones of Canada and in any exclusive Canadian economic zones it may establish under the 1982 *United Nations Convention on the Law of the Sea*.[58]

RECOMMENDATION

8(a). That the *Criminal Code* provide that Canadian citizens be subject to Canadian criminal law when they are in the fishing zones of Canada or exclusive economic zones of Canada, and that they may be prosecuted in Canada for any offence against any Act of the Parliament of Canada allegedly *committed* by them in those zones where either the offender or the victim was at the time engaged in, or there in connection with, activities over which Canada has sovereign rights under international law.

But what of non-Canadians who commit criminal offences against Canadian citizens in Canadian fishing zones? Protesters against the seal hunt include non-Canadians. In view of the facts (a) that international law recognizes activities in our fishing and exclusive economic zones to be of special interest to Canada, (b) that the zones are outside the territorial jurisdiction of courts of other states, and (c) that the zones are regulated in many other respects by Canadian law, we believe that Canada could justifiably extend the applicability of the criminal law of Canada and the jurisdiction of Canadian courts to non-Canadians, for all offences committed by them *against* anyone in the fishing zones or exclusive economic zones of Canada, if either the offender or the victim were engaged in, or there in connection with, activities over which Canada has sovereign rights under international law.

RECOMMENDATIONS

8(b). That the *Criminal Code* provide for non-Canadian citizens in the same way as for Canadian citizens in Recommendation 8(a).

9. That the legislative provisions be so worded as to apply the criminal law of Canada and the jurisdiction of Canadian criminal courts to Canadians and non-Canadians in the Canadian anti-pollution zones in the Arctic beyond the territorial sea of Canada in the same way and to the same extent as we recommend for the fishing and exclusive economic zones of Canada.

II. Artificial Islands, Installations and Structures

Until relatively recently, virtually all offshore activities were conducted on, or by means of, ships to which the criminal law of the flag state applied; or on, or by means of, mines or tunnels extending from the mainland (for example, mines in Cape Breton) under the territorial sea to which the criminal law of the coastal state applied. However, as a result of technological advances, there are now substantial installations (for example oil rigs drilling for oil) in the fishing and exclusive economic zones of Canada beyond the territorial seas, and the question arises: What state's criminal law applies on and in the immediate vicinity of such installations?

The 1958 *Geneva Convention* dealing with fishing zones[59] does not mention artificial islands, installations or structures. But they are mentioned in the 1982 *United Nations Convention on the Law of the Sea*[60] in connection with the 200 mile exclusive economic zone which may subsume the fishing zone of the 1958 *Convention*.

Paragraphs 1, 2 and 8 of Article 60 of the 1982 *Convention* read:

> 1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:
>
> (a) artificial islands;
>
> (b) installations and structures for the purposes provided for in article 56 and other economic purposes;
>
> (c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.
>
> 2. The coastal State shall have *exclusive jurisdiction* over such artificial islands, installations and structures, *including* jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations. [Emphasis added]
>
> 8. Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.

At the present time Canadian criminal law does not apply generally on artificial islands, installations and structures, as such, beyond the territorial sea of Canada.

The need to provide for the applicability of criminal law to offshore artificial islands, and so forth, beyond the territorial sea, is not fanciful or theoretical; that is evident from cases such as the English case of *R.* v. *Bates*[61] in which a person was accused of firing shots from a disused anti-aircraft tower nearly three miles outside the territorial waters of the United Kingdom; he was acquitted on the ground that the tower was not on a ship and was beyond territorial jurisdiction. As installations at sea (including oil rigs, floating docks and floating airports) increase in number, there will of course be an increased need to provide for criminal law to control conduct of people on or in their vicinity. "Vicinity" could be defined as within 500 metres, which is the safety area prescribed in the 1982 *United Nations Convention on the Law of the Sea*.

Since Canada alone may regulate, control or authorize the construction, use and operation of these artificial islands and so forth, in our exclusive economic zones, Canada has an involved interest in maintaining law and order on them regardless of the nationality of the accused or victim of crimes committed on them. Furthermore, even though the artificial islands and so forth, do not amount to Canadian territory, international law, as reflected in the 1982 *United Nations Convention on the Law of the Sea*, seems implicitly to attract the applicability of Canadian criminal law to govern the conduct of all persons on or in the vicinity of them in the exclusive economic zone of Canada. At least that is so in respect of persons who are there in connection with activities over which Canada has sovereign rights under international law.

RECOMMENDATION

10. That the *Criminal Code* provide that Canadian criminal law is applicable to, and Canadian courts have jurisdiction over, any offence committed

on, or within 500 metres of, any artificial island, installation or structure in the fishing or exclusive economic zones of Canada by a Canadian citizen or by a non-Canadian citizen if, at the time of the offence, either the offender or the victim was engaged in, or was present there in connection with, activities over which Canada has sovereign rights under international law.

III. Continental Shelf

In the 1958 *Geneva Convention on the Continental Shelf*,[62] to which Canada is a party, the term "continental shelf" is used as referring

> (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

A more modern definition of "continental shelf" is to be found in the 1982 *United Nations Convention on the Law of the Sea*,[63] Article 76 of which reads in part:

> The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory *to the outer edge of the continental margin, or to a distance of 200 nautical miles* from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance. [Emphasis added]

Under either the 1958 or the 1982 definition, the continental shelf of Canada in the Atlantic Ocean extends more than 200 miles seaward beyond the fishing or exclusive economic zones of Canada, that is, more than 400 miles out into the Atlantic.

Articles 77, 80 and 81 of the 1982 *United Nations Convention on the Law of the Sea*[64] read in part:

> Article 77
>
> **1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.**
>
> **2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.**

> 3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

Article 80

> Article 60 [quoted in part earlier in this Paper] applies *mutatis mutandis* to artificial islands, installations and structures on the continental shelf.

Article 81

> The coastal State shall have the exclusive right to authorize and regulate drilling on the continental shelf for all purposes.

Supposing a non-Canadian, who was being prevented by a Canadian official from unlawful drilling on the continental shelf of Canada, struck the Canadian official. Surely Canadian criminal law should apply to such conduct as part of the exclusive right of Canada to regulate such activity. Canadian legislation in respect of offences on or over the continental shelf (the *Canadian Oil and Gas Production and Conservation Act*[65]) merely creates certain offences related to the continental shelf of Canada. Thus Canadian legislation does not go as far as the *Continental Shelf Act 1964* of the United Kingdom which provides that any act or omission on, under or above installations in areas of the sea (outside United Kingdom territorial waters) designated for exploration or exploitation of the continental shelf, or within 500 metres of such installations, which would constitute an offence if committed in the United Kingdom, shall be deemed to have taken place in the United Kingdom.

The considerations that we mentioned in connection with the need to apply Canadian criminal law to artificial islands, installations and structures in the fishing and exclusive economic zones of Canada are equally applicable to artificial islands and so forth over the continental shelf of Canada.

RECOMMENDATION

11. That the *Criminal Code* provide that Canadian criminal law be applicable to, and Canadian courts have jurisdiction over, any offence committed on or within 500 metres of any artificial island, installation or structure on or over the continental shelf of Canada, by a Canadian citizen or by a non-Canadian citizen if either the accused or the victim was, at the time of the offence, engaged in, or present there in connection with, activities over which Canada has sovereign rights under international law.

IV. High Seas

Seaward, beyond the fishing and exclusive economic zones and the continental shelves, there are the vast areas of the high seas proper where the freedoms of the high seas prevail unfettered by the national controls exercised by coastal states throughout the fishing and exclusive economic zones and over the continental shelves. However, as we will be discussing later on in this Paper, international law recognizes that a state may apply it's criminal law to all people in its registered ships and certain aircraft anywhere, including in, on or over the high seas and, other than on a territorial basis, may prosecute certain persons for offences committed anywhere including the high seas.

A further right of any state to interfere in a limited way with the general freedoms of the high seas is reflected in articles 257, 258 and 259 of the 1982 *United Nations Convention on the Law of the Sea*[66] which read:

> Article 257
>
> All States, irrespective of their geographical location, and competent international organizations have the right, in conformity with this Convention, to conduct marine scientific research in the water column beyond the limits of the exclusive economic zone.
>
> Article 258
>
> The development and use of any type of scientific research installations or equipment in any area of the marine environment shall be subject to the same conditions as are prescribed in this Convention for the conduct of marine scientific research in any such area.
>
> Article 259
>
> The installations or equipment referred to in this section do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.

The extent to which Parliament has legislatively applied Canadian criminal law on or over the high seas to conduct on board Canadian registered ships and conduct on board Canadian registered and certain other aircraft is discussed later in this Paper.

Parliament has not legislatively applied the *Criminal Code* to conduct of persons on ice islands or installations and so forth, that Canada may administer or control on or in the high seas (including Arctic waters as defined in the *Arctic Waters Pollution Prevention Act*).[67]

The particular extraterritorial offence sections (of the *Criminal Code* and of other Canadian statutes) that apply anywhere outside Canada do, of course, also apply to people who contravene them in or on the high seas; however, their extraterritorial applicability is justifiable not on the territorial principle but on other principles of international law as will be discussed later on in this Paper. For example, the universality principle justifies section 75 of the *Criminal Code* making piracy on the high seas an offence.

Since no other national criminal law is likely to apply to "Canadian" artificial or ice islands, installations and so forth, on the high seas, serious crimes could be committed on them with impunity. This is clearly an unacceptable situation. Although there may be difficulties in arriving at suitable definitions to describe what artificial islands, ice islands, ice floes and maritime installations and so forth, on the high seas should be governed by Canadian criminal law, we feel that at least those under the control and administration of the Government of Canada or any agency thereof, such as the Canadian Forces, should be so governed.

RECOMMENDATION

12. That the *Criminal Code* provide that Canadian criminal law is applicable to, and that Canadian criminal courts have jurisdiction to try, any offence committed by anyone (Canadian citizen and non-Canadian citizen alike) on, or within [500 metres] [one nautical mile] of artificial islands, [ice islands], installations and structures that are under the administration and control of the Government of Canada or of a Province of Canada or an agency thereof on the high seas seaward beyond the territorial seas of Canada, other than on ships of non-Canadian registry, if either the offender or the victim at the time of the offence were engaged in, or there in connection with, activities over which Canada has sovereign rights under international law.

CHAPTER FOUR

Ships outside Canada

International law recognizes the right of every state to apply its criminal law to the conduct of every person on board ships registered in that state regardless where in the world the ships are located.

It has been suggested by some writers[68] that the nationality principle is the legal basis for the applicability of the criminal law of the state of registry of a ship to everyone on board the ship; this is said to flow from the fact that a ship has the nationality of the state of registry. However, in our view, since the nationality principle as a basis of applicability of criminal law is founded on the personal status of the accused or (at least to some extent) the victim in relationship to a state, it could be stretching the "nationality" principle beyond recognizable limits to attempt to use it as a basis for applying the criminal law of State X to a foreigner simply because he was on board a ship registered in State X. Albeit that a ship is often spoken of as having the nationality of the state whose flag is flown on the ship (for example, *Geneva Convention on the High Seas*, 29 April 1958, Article 5, paragraph 1,[69] and 1982 *United Nations Convention on the Law of the Sea*, Article 91[70]), there is no more reason or justification for suggesting that this fact confers the nationality of State X *for criminal law purposes* on all persons on board a ship registered in State X, than there would be in suggesting that all persons in the sovereign land territory of State X had the nationality of State X for criminal law purposes. Indeed it is the distinct "territorial" principle *not* the "nationality" principle that justifies the applicability of the local criminal law over all offences on land by any person regardless of his nationality. As far as foreigners on ships are concerned therefore, nationality would not appear to be a suitable basis for the criminal law of the state of the ship's registry being applicable to them — be they accused persons or victims.

The same holds true as far as trying to apply to ships the principle of territoriality. Granted that in the well-known case of *The Lotus*,[71] involving a collision between French and Turkish ships on the high seas, some judges of the Permanent Court of International Justice went along with the Turkish assertion that the Turkish ship (in which the Turkish victim was located when injured) was Turkish territory, there is much doubt that this reflects current international law. As stated by the English Law Commission,[72] the floating island theory is no longer recognized.

The real reason why international law recognizes the applicability of the criminal law of the state of registry of a ship to everyone on board the ship is surely the practical one of that state being in actual, effective and lawful control of the ship and of everyone on board. As stated in the Reporters' Notes at page 102 of the 1982 draft *Restatement of U.S. Foreign Relations Law*: "Probably the rule (basis of criminal jurisdiction over conduct on ships and aircraft) is better seen as *sui generis* (*i.e.*) an agreed addition to the general bases of jurisdiction."

In any event, regardless of the reason, it is beyond doubt that under customary international law the state of a ship's registry has a right to apply its criminal law to, and enforce it against, everyone on the ship in its own territory, on the high seas and, subject to the concurrent criminal jurisdiction of the courts of the foreign state, in the territorial seas and ports of foreign states. As to criminal jurisdiction over conduct aboard foreign vessels *in ports*, professors Williams and Castel in their recent work on Canadian criminal law state that:

> A port is classified in public international law as part of the internal waters of a state. It is as much the territory of the coastal state as the land itself. Nevertheless, questions have arisen concerning the jurisdiction of a coastal state over criminal offences committed on board a foreign merchant vessel in its ports and harbours. The problem stems from the fact that the vessel is also subject to the jurisdiction of the flag state. In essence there is concurrent jurisdiction in such situation.
>
> It is difficult to state categorically what the better position is in cases of competing claims by states in such circumstances. The answer to the problem lies in the practice of the coastal state to which the port or harbour belongs....
>
> From the differing opinions two approaches have evolved. These are commonly known as the English and French views. Both have found acceptance amongst jurists and writers and as will be seen in the following discussion, differ more in form than in substance.
>
> The English approach is straightforward. A state has the right and the power to apply fully its criminal laws and regulations within its ports and harbours.
>
> The French approach takes a more limited view of the port state's jurisdiction over foreign merchant vessels. A distinction is drawn between on the one hand, matters of discipline or economy internal to the vessel over which the authorities of the flag state have the primary jurisdiction and, on the other hand, matters which affect visitors to the vessel or compromise the peace and good order of the port, over which the local authorities of the port state have jurisdiction. The French have refrained from exercising jurisdiction even in the latter case except where the peace and good order of the port are definitely disturbed.

> These two approaches differ more in form than in substance. Although, at first blush it may appear that the British port authorities will intervene in all cases, in practice they do not. In fact, they act, as do the French only when the peace and good order of the port is affected.[73]

I. *Criminal Code* — General Remarks

Neither the *Criminal Code* nor any other Canadian statute says that it or Canadian criminal law generally applies on board ships registered in Canada. Section 433 of the *Criminal Code* applies only to the territorial sea of Canada and deals only with the jurisdiction of courts. Thus Canada has not *in its criminal legislation* clearly implemented the right that every sovereign state has under customary international law to make its criminal law generally applicable to all persons on board ships registered in, and flying the flag of, that state.[74]

England has done so; the criminal law of England applies to persons on board an English ship whatever their nationality and whether on the high seas or foreign waters.[75] How far this tenet of English common law and statutory law has been carried over into Canadian criminal law is not clear. It is, of course, clear from section 8 of the *Criminal Code* that common law offences and British statutory law offences are no longer part of the criminal law of Canada. But we are not concerned here with the incorporation of British *offences* into Canadian criminal law. Rather we are concerned with (i) the extraterritorial applicability of Canadian criminal law on Canadian ships and (ii) the extraterritorial jurisdiction of Canadian courts to try offences committed on such ships. Both (i) and (ii) must exist before Canadian criminal law can be enforced by the courts. As we have stated, (i) is not clear. What about (ii)?

In connection with (ii) let us consider to what extent, if any, section 8 of the *Criminal Code* affects generally the matter of the jurisdiction of Canadian criminal courts. It will be seen that that section of the *Criminal Code* does not negate any criminal jurisdiction conferred on Canadian criminal courts by common law or British statutes to punish for contempt of court, and does not expressly negate any extraterritorial jurisdiction held by Canadian criminal courts by virtue of common law or applicable British statutes. And so, if for criminal jurisdiction purposes British ships have been referred to as "floating (British) islands" why not Canadian ships as "floating (Canadian) islands?" Here the answer seems to be not only that "the picturesque (floating island) metaphor is not well founded in legal principle,"[76] but that the language used by the Parliament of Canada in subsection 5(2) of the *Criminal Code* (and possibly 7(1) as well) expressly negates any extraterritorial jurisdiction that the common law or British statutes may have conferred on Canadian criminal courts. The expressions "in Canada," "outside Canada" and "throughout Canada" used in those sections seem to refer to the territorial limits of Canada *not including ships* — particularly in the light of several other provisions of the *Criminal Code* (for example, subsections 6(1) and (1.1)) deeming certain offences committed on aircraft outside Canada to have been committed in Canada.

In the light of the general rule mentioned in Chapter One of this Paper, that only when expressly provided by the Parliament of Canada, are offence sections of the *Criminal Code* applicable outside the territory of Canada and enforceable by courts in Canada, the foregoing raises doubts that the *Criminal Code* applies to conduct of persons in Canadian ships beyond the territorial sea of Canada.

II. *Canada Shipping Act*

And so, the probability is that, if Canadian criminal law applies generally aboard Canadian ships outside Canadian internal waters and the territorial sea of Canada, and if Canadian criminal courts have jurisdiction to try *Criminal Code* offences committed on board such Canadian ships, it is by virtue of section 683(1) of the *Canada Shipping Act*,[77] which reads as follows:

> Notwithstanding anything in the *Criminal Code* or any other Act where any person, being a British subject domiciled in Canada, is charged with having committed any offence on board any Canadian ship on the high seas or in any port or harbour in a Commonwealth country other than Canada or in any foreign port or harbour or on board any British ship registered out of Canada or any foreign ship to which he does not belong, or, not being such a British subject, is charged with having committed any offence on board any Canadian ship on the high seas, and that person is found within Canada, any court that would have had cognizance of the offence if it had been committed within the limits of its ordinary jurisdiction has jurisdiction to try the offence as if it had been so committed.

Subsection 683(1) of the *Canada Shipping Act* seems to deal with three types of situations:

(a) *A British subject domiciled in Canada* who commits an offence *on a Canadian ship* on the high seas or in any port in a foreign or Commonwealth country (that is, on a Canadian ship anywhere);

(b) *A British subject domiciled in Canada* who commits an offence *on a British or foreign ship* registered out of Canada to which he does not belong; and

(c) *A person other than a British subject domiciled in Canada* who commits an offence *on a Canadian ship on the high seas.*

The above itemization is enough to indicate the complexity of the law as now written. It also raises questions as to why our legislation authorizes Canadian courts to exercise criminal jurisdiction over non-Canadian British subjects domiciled in Canada in respect of offences committed on board foreign ships outside Canadian ports or the Canadian territorial sea, or over offences committed by Canadians on board foreign ships, when Canadian courts do not have jurisdiction over offences committed by Canadians in foreign countries?

The simple answer to these questions appears to be that Canada, as a party to the *British Commonwealth Merchant Shipping Agreement* signed at London, England, December 10, 1931,[78] was obligated to enact such reciprocal or uniform Commonwealth legislation.

Thus, it would seem that Canada was obligated (as long as it remained party to that agreement) to retain statutory provisions along the lines of section 683 of the *Canada Shipping Act*. However, Canada gave notice of termination of that agreement on 20 October 1978 that became effective 20 October 1979.

Furthermore, the changes in meaning of "British subject" under United Kingdom legislation[79] and Canadian legislation,[80] and the growth in independence of the member states of the Commonwealth, have substantially changed the premises which prompted the parties to enter into the 1931 Agreement which, in turn, gave rise to section 683 of the *Canada Shipping Act*.

It seems to us that the governing principle here should be founded on considerations of protection and control. Since ships registered in Canada come under Canada's protection and control, Canadian statutory criminal law should expressly apply to and on them and Canadian courts should have criminal jurisdiction to try all persons for any offence committed on board them anywhere (just as, when Canadians are on board a ship registered in another country, that country's criminal law applies to them, and, except in respect of offences committed when the ship is in the territorial seas or inland waters of Canada, the courts of that country generally exercise exclusive criminal jurisdiction).

In any event, from the present wording, it is not clear whether subsection 683(1) extends *the applicability of Canadian criminal law* to Canadian ships or whether it merely provides for what court has *jurisdiction to try offences created by the Canada Shipping Act*. There are no Canadian cases on the issue. At first sight, it looks like a jurisdictional or venue section rather than one dealing with the applicability of criminal law. A comparison of its language with section 6 of the *Criminal Code* suggests that conclusion inasmuch as section 6 expressly creates offences outside Canada (subsection 6(1)) as well as prescribing which courts have jurisdiction (subsection 6(3)). Furthermore, there are "offences" against the *Canada Shipping Act* (that is, created by the Act)[81] to which subsection 683(1) could be referring. Nor should it be forgotten that subsection 683(1) is modelled on the *British Merchant Shipping Act, 1894*, a provision passed in a context where the English criminal law of indictable offences otherwise applied (as a matter of admiralty law and statute) to all persons on board British ships.

The foregoing would seem to afford cogent arguments that subsection 683(1) is merely aimed at conferring trial jurisdiction on certain courts, not at extending the applicability of Canadian criminal law, that is, not applying offence sections of the *Criminal Code* to ships. In England there have been cases and commentary on whether the counterpart subsection in the English statute (686(1) of the *Merchant Shipping Act 1894*) extends the ambit of criminal law (particularly in the case of summary offences which otherwise do not generally extend to British ships) or whether it merely deals with trial jurisdiction.[82]

In the recent case (1981) of *R.* v. *Kelly and Others*[83] the following questions on certified points of law were put to the House of Lords:

> Whether the English criminal law, and more particularly the *Criminal Damage Act 1971*, extends to the acts of British subjects when passengers on foreign ships when on the high seas, and whether the English courts have power to try such persons for such acts by virtue of section 686 subsection (1) of the *Merchant Shipping Act 1894* or any other rule of law.

Subsection 686(1) reads:

> *Where* any person, being *a British subject, is charged with having committed any offence on board any British ship on the high seas or* in any foreign port or harbour or *on board any foreign ship* to which he does not belong, or, not being a British subject, is charged with having committed any offence on board any British ship on the high seas, *and that person is found within the jurisdiction of any court in Her Majesty's dominions*, which would have had cognizance of the offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction, *that court shall have jurisdiction to try the offence* as if it had been so committed. [Emphasis added]

Lord Roskill, with whom the other Lords concurred, answered as follows:

> ... I have already said that the certified question does not permit of a simple monosyllabic answer. I would answer it by saying that by virtue of section 686(1) of the *Merchant Shipping Act 1894* the Crown Court had jurisdiction to try the appellants for the several offences against the *Criminal Damage Act 1971* with which they stood charged.

The answer does not expressly deal with the question's first part as to whether the English *Criminal Damage Act* is applicable to the conduct of British subjects on board foreign ships on the high seas. One would have hoped that, given the importance of the court's decision, the court would have given an express answer to that question or to that part of "the question" particularly since, in English law, there is a clear distinction between "applicability of law" and "trial jurisdiction of courts." That distinction in the context of extraterritoriality was underlined in the English case of *Regina* v. *Martin*,[84] yet that case was not discussed or even referred to by Lord Roskill in *Kelly* — albeit that *Martin* concerned an offence on an aircraft. In *Martin* the court had to consider subsection 6(1) of the *Civil Aviation Act 1949* which reads:

> Any offence whatever committed on a British aircraft shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be.

Based on that provision, Martin was being tried in England for an offence against the (United Kingdom) *Dangerous Drug Regulations* alleged to have been committed on a British aircraft outside England. The court (Devlin J.) held that since the relevant provisions of those regulations were implicitly not applicable outside England, there was no "offence" in respect of which the court could exercise the extraterritorial jurisdiction conferred on it by the *Civil Aviation Act 1949*.[85] In view of the fact that Lord Roskill in the *Kelly* case agreed at page 1101 that "the *Criminal Damage Act 1971* does not have extraterritorial effect," it would have been consistent with the *Martin* decision for the House of Lords to have found that the conduct of Kelly outside England, namely on a foreign vessel on the high seas, could not constitute an "offence" under the *Criminal Damage Act 1971* and therefore that there was no "offence" upon which the court could exercise its jurisdiction under the *Merchant Shipping Act*, subsection 686(1). The territorial principle governing the applicability of offence sections of English criminal law is the same in both cases. As stated by Lord Reid in *R*. v. *Treacy*:[86]

> It has been recognised from time immemorial that there is a strong presumption that when Parliament, in an Act applying to England, creates an offence by making certain acts punishable it does not intend this to apply to any act done by anyone in any country other than England. Parliament, being sovereign, is fully entitled to make an enactment on a wider basis. But the presumption is well known to draftsmen, and where there is an intention to make an English Act or part of such an Act apply to acts done outside England that intention is and must be made clear in the Act.

Furthermore, when one grammatically analyses subsection 686(1), it is clear that insofar as offences on *foreign ships* are concerned it does not refer to the high seas or any place outside England. That fact must surely be given great weight when the same subsection refers to offences committed outside England on *British ships* "on the high seas or any foreign port."

We therefore feel that even if *Kelly* is followed in Canada, or were to be followed in Canada, the corresponding provision in the *Canada Shipping Act*, namely subsection 683(1), should be repealed because the undue straining of the subsection to convert it into, or to read it as, an offence-creating or ambit-of-law section does violence to the territorial principle of our criminal law; to strain it to convert its foreign ship provision into one that confers extraterritorial jurisdiction on Canadian courts in respect of offences on foreign ships *outside Canadian waters*, does violence to the grammatical construction of its provisions. In any event there would seem to be no valid reason why Canadian criminal law should be generally applicable to British subjects or Canadian citizens outside Canada simply because they are on board foreign ships. Like everyone else they should, of course, be so subject when in, or on board, any ships in the territorial sea of Canada or on board Canadian registered ships anywhere.

The poor draftsmanship that is reflected in subsection 686(1) of the English *Merchant Shipping Act 1894*, and copied as subsection 683(1) into the *Canada Shipping Act*, is also responsible for uncertainty as to whether the subsection applies to British Commonwealth ports as being included in "high seas," or whether Commonwealth ports are excluded, given that "foreign ports" are mentioned. In *R.* v. *Liverpool Justices, ex parte Molyneux*[87] the English Court of Queen's Bench had to deal with that matter and found that the expression "high seas" as used in subsection 686(1) of the English Act includes Commonwealth ports. In so doing, it disagreed with the finding of the Deputy Recorder of Liverpool. One wonders how such imprecise criminal legislation has been allowed to remain in our statutes for so long.

For our purposes, we do not need to consider further the many competing arguments which have been advanced on the question whether subsection 683(1) extends the applicability of criminal law or whether it is simply procedural, enforcement or jurisdictional measures. What is abundantly clear is that the matter should be clarified by legislation.

RECOMMENDATION

13. That since the *British Commonwealth Merchant Shipping Agreement* of 10 December 1931 has been terminated by Canada, subsection 683(1) of the *Canada Shipping Act* be repealed and replaced by a provision in the *Criminal Code* to apply Canadian criminal law to ships registered in Canada and everyone on board them wherever they may be, whether within Canadian territory, or on the high seas or in British or foreign territorial seas or inland waters.

If subsection 683(1) is repealed (and replaced by an "applicability of law" provision as we recommend), another provision will, of course, also be required to assign jurisdiction to the courts to try offences committed by anyone on board Canadian ships anywhere. We should add that since international law recognizes the criminal jurisdiction of courts of the state of the ship's flag over the conduct of everyone in the ship, we see no reason why a distinction as to amenability to the jurisdiction of courts arising out of such conduct should be made between accused persons on the basis of nationality; consequently, we see no reason for legislation to provide that the consent of the Attorney General of Canada be required to prosecute an alien for an offence committed on board a Canadian ship anywhere. The views we expressed earlier in Chapter One of this Paper with respect to section 433 of the *Criminal Code* and the Canadian territorial sea are equally relevant here.

RECOMMENDATION

14. That a jurisdiction section in the General Part of the *Criminal Code* provide that for any offence committed outside Canada on board a ship registered in Canada the accused be subject to prosecution in any place in Canada where the accused happens to be, but that it not provide that prosecution be subject to the consent of the Attorney General of Canada.

III. *Criminal Code* — Relevant Provisions (sections 154, 240.2 and 243)

At the present time, the offences under *Criminal Code* section 154 (Seduction of Female Passengers on Vessels), section 240.2 (Navigating or Operating a Vessel with More than 80 mgs. of Alcohol in Blood), and section 243 (Sending or Taking Unseaworthy (Canadian Ship) to Sea), are not punishable when committed outside Canada — except for a section 243 offence when the voyage is from United States inland waters to a place in Canada. Offences under those sections committed on Canadian ships would become punishable in Canada, regardless of where in the world committed, if our recommendation that the criminal law of Canada apply to all such ships anywhere were adopted.

RECOMMENDATIONS

15. If Recommendations 13 and 14 are adopted, that the *Criminal Code* be amended to make offences under sections 154, 240.2 and 243 committed on, or in respect of, Canadian ships punishable in Canada when committed in Canada or anywhere outside Canada, not just during voyages between the United States and Canada as paragraph 243(1)(*b*) now provides.

16. The expression "Canadian ship" is used in section 243 of the *Criminal Code* but is not defined in the *Criminal Code*. We recommend that the *Criminal Code* define "Canadian ship" by referring to the definition of it in section 2 of the *Canada Shipping Act* or by spelling out the definition of it in the *Code*.

A word must also be said about subsection 683(2) of the *Canada Shipping Act*. That section confers jurisdiction on a court in a Commonwealth country where a *British subject domiciled in Canada* is present, to try him for an offence committed on board a Canadian ship on the high seas or in a foreign or Commonwealth port or harbour or on a British ship or foreign ship. Like the English Law Commission,[88] we think that that section is out of date.

RECOMMENDATION

17. That, given the termination of Canada's relevant obligations under the *British Commonwealth Merchant Shipping Agreement 1931*, the provisions of subsection 683(2) of the *Canada Shipping Act* be repealed.

IV. Crews of Canadian Ships

The disposition we have proposed for offences on board Canadian ships would cover a substantial portion of what now appears in section 684 of the *Canada Shipping Act*, namely, offences by crew members afloat. That section however, also deals with offences *ashore* by crew members and former crew members of Canadian ships committed against persons and property outside a Commonwealth country. It reads:

> All offences against property or person committed in or at any place either ashore or afloat out of a Commonwealth country by any master, seaman, or apprentice who at the time when the offence is committed is, or within three months previously has been, employed in any Canadian ship, shall be deemed to be offences of the same nature respectively, and are liable to the same punishments respectively, and are inquired of, heard, tried, determined and adjudged in the same manner and by the same courts and in the same places as if those offences had been committed within Canada.

It will be noted that the crew members covered are not limited to those currently employed but include those who have been employed by the ship *within the previous three months*, even though the offence was committed *after* they ceased to be such crew members.

We think that the applicability of Canadian criminal law to, and the jurisdiction of Canadian criminal courts over, persons who are ashore while outside Canada as members of the crew of a ship registered in Canada, would be justifiable under international law on somewhat the same grounds as federal public servants abroad are subject to the *Criminal Code* under subsection 6(2) of it; namely, because of an implicit obligation on a state to exercise some control over the conduct of its representatives, employees and agents in foreign countries, and also to protect the good name of Canada abroad as represented by its public servants, armed forces, Royal Canadian Mounted Police and, to some extent, the crews of Canadian ships. If the protective principle alone would not suffice, the combination of it and the nationality principle should do so. Of course the criminal law of the port-state would also be applicable (on the territorial principle); but double jeopardy should be avoided through pre-trial negotiations between representatives of Canada and the port-state, and by the application of the doctrine of *autrefois convict* or *acquit*.

Although ordinarily, apart from disciplinary offences, the conduct of Canadian crew members ashore outside Canada is a matter of concern only to the state where it occurs, there are situations that should be provided for in Canadian legislation. The English Law Commission gives as examples, cases of unlawful conduct of crew members aimed at other crew members or passengers, or cases involving a fracas between crew members and the local populace which the local authorities might not wish to prosecute. While cases of this kind may not be numerous, there should be Canadian law and jurisdiction provisions to deal with them when the accused was a *serving* crew member at the time of the offence. But, like the English Law Commission[89] we think that *former* crew members — that is, persons who commit offences *after* they cease to be crew members of Canadian registered ships, should not be covered. Insofar as an offence committed in another country by a former member of a crew of a ship registered in Canada is concerned, we are unaware of any rule of international law that would justify the applicability of Canadian criminal law and jurisdiction simply because the accused had been, before he committed the offence (but not at the time he committed it), a member of such a crew.

We think that conduct ashore in any place outside Canada by persons when they *are* crew members of Canadian ships, which would amount to an offence if committed in Canada, should constitute an offence under Canadian criminal law and should be triable by criminal courts in Canada.

RECOMMENDATION

18. That: (a) section 684 of the *Canada Shipping Act* be amended to delete mention of former crew members; and (b) the *Criminal Code* provide in the General Part that Canadian criminal law be applicable to, and Canadian courts have jurisdiction to try, a person for committing an offence ashore outside Canada while there as a serving member of a crew of a ship registered in Canada.

V. Jurisdiction to Try Offences Committed on Ships

In discussing *ships* up to this point, we have been dealing mainly with the *applicability of Canadian law*. We now turn to examine more closely the question of the *jurisdiction* of criminal courts in Canada *to try* offences committed on board ships. In this connection subsections 681(1) and 682(1) of the *Canada Shipping Act* read:

> **681.** (1) For the purpose of giving jurisdiction under this Act, every offence shall be deemed to have been committed and every cause of complaint to have arisen either in the place in which the offence actually was committed or arose, or in any place in which the offender or person complained against may be.
>
> **682.** (1) Where any district within which any court, justice of the peace, or other magistrate has jurisdiction either under this Act, or under any other Act or at common law, for any purpose whatever, is situated on the coast of any sea, or abutting on or projecting into any bay, channel, lake, river, or other navigable water, every such court, justice, or magistrate has jurisdiction over any vessel being on, or lying or passing off, that coast, or being in or near that bay, channel, lake, river, or navigable water, and over all persons on board that vessel or for the time being belonging thereto, in the same manner as if the vessel or persons were within the limits of the original jurisdiction of the court, justice or magistrate.

At first reading it could appear that subsections 681(1) and 682(1) cover the same ground, so to speak. However we think not. It is seen that subsection 681(1) deems offences to have been committed at the place (in Canada) where the offender may be. Subsection 682(1) on the other hand simply extends the territorial jurisdiction (of those of our criminal courts that are located in coastal districts) to encompass ships, and all persons in them, in waters off the coast of Canada. The result is that when an offender under the *Canada Shipping Act* is in a ship off the coast of Canada (although how far off is not stated), he is, by virtue of subsection 682(1), at a place within the territorial limits of jurisdiction of a (coastal) court, and, by virtue of subsection 681(1), the offence shall be deemed to have been committed in that place.

Subsection 682(1) appears to deal also with substantially the same matter as does subsection 433(1) of the *Criminal Code*, namely, jurisdiction of Canadian courts to try offences that occur on waters off the coast of Canada. However there are the following differences:

(a) Subsection 682(1) confers jurisdiction on the court situated on the coast of any sea, bay, channel, lake, river or other navigable water on which an offence by or on board a ship has occurred; whereas subsection 433(1) of the *Criminal Code* confers jurisdiction in respect of offences on the territorial sea (whether or not on board or by means of a ship) on the "court having jurisdiction in respect of similar offences in the territorial division nearest to the place where the offence was committed."

(b) Subsection 433(1) of the *Criminal Code* is not applicable in fishing zones beyond the territorial sea of Canada, but subsection 682(1) of the *Canada Shipping Act* is not so restricted.[90]

(c) The *Criminal Code* provides in subsection 433(2) that the consent of the Attorney General of Canada is required before a non-Canadian citizen can be prosecuted pursuant to that section, but there is no similar qualification in the *Canada Shipping Act*.

RECOMMENDATION

19. Notwithstanding those differences, we recommend that subsections 682(1) of the *Canada Shipping Act* and 433(1) of the *Criminal Code* be examined by the Department of Justice and the Department of Transport to see if all the provisions of them need be retained, and that whatever provisions are retained be redrafted to provide *clearly* what is intended.

As far as the consent of the Attorney General of Canada to prosecute is concerned, in the *Gordon* case Mr. Justice Anderson stated:

> [W]hile it may appear illogical that the consent of the Attorney General is required in respect of offences committed within the territorial sea (under section 433(2) of the *Criminal Code*) and not in respect of offences committed in an area beyond the territorial sea (under the *Canada Shipping Act*), the courts cannot legislate by adding words which are not there to a provision of the *Criminal Code*.[91]

We think that the illogical distinction mentioned in the *Gordon* case should be removed by enacting in the *Criminal Code* a requirement that the consent of the Attorney General of Canada be obtained to prosecute a person in Canada for any indictable offence that is an extraterritorial offence under Canadian law, if the offence was committed on board a ship of *non-Canadian registry* outside Canada, for example, an offence on a Norwegian ship in a Canadian fishing zone beyond the territorial sea of Canada, or an offence under *Criminal Code* subsection 6(2) of assault by a Canadian public servant on a person in a French ship in the territorial sea of France. As we noted earlier when we dealt with the territorial sea and section 433 of the *Criminal Code*, we feel that the criterion of citizenship of the accused is not an appropriate one on which to determine whether or not the consent of the Attorney General of Canada is required when the offence was committed on Canadian territory, on or in the territorial sea of Canada, or anywhere on board a ship registered in Canada.

RECOMMENDATION

20. Provide in the *Criminal Code* that the consent of the Attorney General of Canada be required to prosecute a person for an offence committed outside Canada in or by a ship of foreign registry.

On the subject of ships we should note that members of the Canadian Forces and persons accompanying them on board vessels of the Canadian Forces are subject to the *Criminal Code* and other federal statutes by virtue of the Code of Service Discipline.[92] This, however, is an extraterritorial extension of Canadian criminal law to a particular category or class of people and will be dealt with in that context in Chapter Six.

VI. *Maritime Code*

This would seem to be an appropriate point at which to consider the recently enacted but as yet unproclaimed *Maritime Code Act*.[93] Schedule III of it reads in part:

> BI-1 Except where otherwise provided, this Code applies to all ships within the internal waters, the territorial sea and the fishing zones of Canada and to persons on board such ships.
>
> BI-4(1) This Code does not apply to foreign registered ships or to persons, other than Canadian citizens, on board such ships where such ships are on passage through the zones of Canada.

It will be noted that it is the *Maritime Code*, not the *Criminal Code* that is spoken of in section BI-1. Furthermore, sections BI-11 and BI-12 of the *Maritime Code* speak only of "an offence against this Code" — that is, the *Maritime Code*. And so (contrary to the views of some authors),[94] the *Maritime Code* does not appear "to extend the ambit of Canadian criminal law to offences (other than offences against the *Maritime Code*) committed by foreigners on board foreign ships in the Canadian territorial sea." Perhaps the draftsmen of the *Maritime Code* felt that they could make the same assumption as did the draftsmen of section 433 of the *Criminal Code* when conferring jurisdiction on Canadian courts in respect of offences in the Territorial Sea of Canada, namely, that Canadian law already applies there inasmuch as the territorial sea forms part of the sovereign territory of Canada under national and international law. But the validity of that assumption is questionable. In *R.* v. *Keyn*[95] the majority felt that although a coastal state has the "capacity" under international law to legislate over its territorial sea, that does not mean that it has done so; and it held that the criminal law of England had not (at that time) been extended to England's territorial sea so as to encompass foreigners in foreign ships there.

In our view, and in the view of the federal Department of Justice, the *Maritime Code* does not (contrary to the views of some authors) "extend the ambit of Canadian criminal law to ... all persons regardless of nationality on board Canadian vessels wherever they might be, subject to section BI-6(3) and (4)."[96]

Section BI-6 reads:

> (1) *This Code* applies to Canadian ships and Canadian identified ships on the high seas and within the waters of a foreign state and to persons on board such ships. [Emphasis added]
>
> (2) A law of a foreign state that, by its express terms, applies both to the ships of that state and to all other ships within the waters of that state applies, together with all other laws of that state that are required for the administration and enforcement thereof, to Canadian ships that are within the waters of the foreign state.
>
> (3) Notwithstanding subsection (1), a provision of this Code does not apply to a Canadian ship that is within the waters of a foreign state where compliance with such provision would require a person to contravene a law of that foreign state that, by its express terms, applies both to the ships of that state and to all other ships within the waters of that state.
>
> (4) Where an offence described in the *Criminal Code* is committed on board a Canadian ship within the waters of a foreign state and the master or owner of the ship, or the diplomatic representative of Canada in that foreign state requests the intervention of a police authority in that state, the laws of that state apply with respect to the ship and the persons on board the ship to the extent necessary to enable the request to be complied with.

Subsection BI-6(4) could merely be saying that when some conduct occurs on board a Canadian ship that would have constituted a *Criminal Code* offence if it had occurred in Canada (for example, assault or murder), or when that conduct fits the description of an extraterritorial *Criminal Code* offence (for example, the fraudulent use of a Canadian passport outside Canada contrary to section 58), then that conduct, plus the request to a police authority of the foreign state, will cause the laws of the foreign state to be applicable to some extent.

In our view, not only does subsection (4) not make applicable the provisions of the *Criminal Code* of Canada, the subsection is to some extent misleading in that it fails to indicate that when a Canadian ship is in a foreign port and a crime under the laws of the port-state occurs, the port-state authorities and courts have the right — at least in cases where the "peace of the port" has been disturbed — to exercise criminal jurisdiction even without a request from the master of the ship or a diplomatic representative of Canada.[97]

RECOMMENDATION

21. That subsection BI-6(4) be redrafted to state clearly what is intended and to describe accurately the jurisdiction of the authorities of the port-state over Canadian ships in foreign ports.

A further defect in the *Maritime Code* is found in the last lines of subsection BI-4(2) which reads:

> (2) Notwithstanding subsection (1), where a foreign registered ship is on passage through the territorial sea of Canada and
>
> (*a*) an offence described in the *Criminal Code* is committed on board the ship and
>
> (i) the offence directly affects a Canadian citizen or any property within Canada, or
>
> (ii) the master or owner of the ship or the diplomatic representative in Canada of the foreign state in which the ship is registered or otherwise documented requests the intervention of a police authority in Canada, or
>
> (*b*) the ship or a person on board the ship is engaged or intends to engage in activity that is detrimental or that is likely to become detrimental to the peace, security or good order of Canada,
>
> *such of the provisions of the laws of Canada as are appropriate to the circumstances apply to the ship and to persons on board the ship.* [Emphasis added]

There is a danger that the application of the *expressio unius est exclusio alterius* rule could result in these last two lines being interpreted to mean that *all* of the *Criminal Code*, indeed of the criminal law of Canada, *does not apply* to a foreign ship in passage through our territorial sea. Surely *all* our criminal law *does apply* but *enforcement* of it will only be undertaken in the circumstances mentioned in paragraphs (*a*) and (*b*) of subsection (2).

RECOMMENDATION

22. That subsection BI-4(2) be amended accordingly so that it does *not* say that only *some* of our criminal law applies to foreign ships in passage through the territorial sea of Canada, but will say that *enforcement* of our criminal law will only be undertaken in the circumstances mentioned in that subsection. It may be advisable to do so by amending the opening words of the subsection to read:

> **(2) Notwithstanding subsection (1), the [criminal] law of Canada shall be *enforced* where a foreign registered ship is on passage through the territorial sea of Canada and ....**

The last lines of subsection (2) should then be deleted.

Section BI-28 of the *Maritime Code* uses different language than does paragraph BI-4(2)(*a*) in speaking of offences committed on board a ship while outside Canadian waters, to wit: "offences created by an Act of Parliament for which an offender may be prosecuted by indictment." However even that language does not in itself clearly apply all the *Criminal Code* offence sections to everyone on Canadian ships for the simple reason that in the *Criminal Code*, the *Maritime Code Act* itself, and in many other Acts, Parliament has expressly created particular offences capable of being committed outside Canada, and which therefore fit the description and the situation contemplated in section BI-28, namely, indictable offences committed outside Canadian waters that are punishable as extraterritorial offences under Canadian Acts of Parliament.

Obviously the law needs to be clarified. In our opinion there should be no equivocation or ambiguity in this important area of the law.

RECOMMENDATION

23. That the *Criminal Code* rather than the *Maritime Code* provide clearly that the criminal law of Canada be applicable to all Canadian ships and all persons on board them wherever the ships may be. (See Recommendations 13 and 14.)

While that would give rise to a situation of concurrent applicability of the criminal law of Canada and the criminal law of the state of the territorial sea or internal waters in which a Canadian ship may find itself, such a situation is not unusual; it can be sorted out through agreed prescribed arrangements or by a state's acknowledgment, in any given case, of the rightful exercise of paramount jurisdiction by the courts of another state — either pursuant to intergovernmental discussions at the official or diplomatic level or as a result of the implementation of an extradition treaty. Furthermore, as discussed in Chapter Fifteen, pleas of *autrefois convict* or *acquit* should normally be available to an accused — at least before a court in Canada.

CHAPTER FIVE

Aircraft outside Canada

The first matter to be considered under this heading is the extent to which, under international law, a state may apply its criminal law to offences on board aircraft outside its territory or airspace. Certain offences on, or in respect of, aircraft such as piracy are probably universal offences in respect of which any state may apply its criminal law under the universality principle; and, to the extent that a state's security may be adversely affected by internationally recognized offences on or in respect of aircraft, such as hijacking, the protective principle of international law would justify the applicability of a state's criminal law.

But what about crimes generally? Neither those international law principles nor the nationality principle nor the territorial principle are realistic bases for a state's purporting to extend the applicability of its criminal law generally to foreigners on board aircraft *outside its territory*. The basis upon which a state may apply its criminal law to offences committed on board aircraft or in respect of aircraft is now governed by three international conventions on the subject. Furthermore, whether or not these conventions are declaratory of customary international law, Canada as a party to them is bound to implement them as conventional international law. They are:

- *The Tokyo Convention on Offences and Certain Other Acts on Aircraft*, 1963,[98]
- *The Hague Convention for the Suppression of Unlawful Seizure of Aircraft*, 1970,[99] and
- *The Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 1971.[100]

The Conventions authorize and require Canada, from an international point of view, to deal with offences on, or in respect of, aircraft outside Canada as follows.

(a) Under the *Tokyo Convention*, Canada is obligated to apply Canadian criminal law generally to all conduct and persons on aircraft registered in Canada.

(b) Under the *Hague Convention*, Canada is to create the particular offence of hijacking.

(c) Under the *Montreal Convention*, Canada is obligated to create the offence of endangering the safety of aircraft in flight.

(d) Under the three Conventions respectively Canada is obligated to confer jurisdiction on Canadian criminal courts to try the offences covered or mentioned in (a), (b) and (c) above.

The Canadian implementing legislation appears in the *Criminal Code* as subsections 6(1), (1.1) and (3), and sections 76.1 and 76.2. These provisions are included in Appendix A to this Paper.

As explained below, it appears to us that Canadian legislation falls substantially short of properly implementing the three Conventions. There are no apparent valid policy reasons for this.

We will now examine the relevant provisions of the Conventions and compare them with the relevant provisions of the *Criminal Code*.

I. Criminal Offences Generally — *Tokyo Convention*

The *Tokyo Convention* reads in part:

> Article 1
>
> 2. This Convention shall apply in respect of offences committed or acts done by a person *on board any aircraft registered in a Contracting State*, while that aircraft is in flight or on the surface of the high seas or any other area outside the territory of any State. [Emphasis added]
>
> Article 3
>
> 1. *The State of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board.* [Emphasis added]
>
> 2. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction as the State of registration over offences committed *on board aircraft registered in such State*. [Emphasis added]

> 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Subparagraph 6(1)(*a*)(i) of the *Criminal Code* is consistent with the provisions of Articles 1 and 3 of the *Tokyo Convention*; but paragraph 6(1)(*b*) of the *Criminal Code* goes much further since, in effect, it applies all Canadian legislative indictable offence provisions to the conduct of anyone that occurs on board any aircraft of any state anywhere during a *flight that terminates in Canada*. That criterion (terminating or landing in Canada) is not one that is authorized under the *Tokyo Convention* dealing with the general application of a state's criminal law to conduct on aircraft; it is a criterion authorized by the *Hague* and *Montreal Conventions* to justify prosecution by a state for only certain particular offences, namely: hijacking, endangering safety of aircraft in flight, or rendering aircraft incapable of flight. (Yet somewhat strangely, subsection 6(1.1) of the *Criminal Code*, which deals with those particular offences, specifies only the criterion of the accused's being "found anywhere in Canada." See pages 59 and 62.)

It may be that the drafters of paragraph 6(1)(*b*) of the *Criminal Code* thought that paragraph 3 of Article 3 of the *Tokyo Convention* conferred *carte blanche* legislative authority on Canada to apply Canadian criminal law to anyone on any aircraft anywhere: however, that interpretation would be inconsistent with paragraph 2 of Article 1 and with paragraphs 1 and 2 of Article 3 of the *Tokyo Convention* which expressly refer to "[t]he State of registration of the aircraft" or "aircraft registered in such State." Furthermore, paragraph 3 of Article 3 must surely be based on the assumption that the criminal jurisdiction under national law would be consistent with principles of international law. As we know, those principles do not recognize an unqualified right in a state to apply its criminal law to conduct of persons that occurs outside its territory.

If the criterion of flight termination in Canada was put in paragraph 6(1)(*b*) of the *Criminal Code* to enable Canada to justify (in terms of the *Hague* and *Montreal Conventions*) prosecution in Canada of offences under sections 76.1 and 76.2 and subsection 6(1.1) of the *Criminal Code*, it is misplaced for two reasons: First, given the *express* references to sections 76.1 and 76.2 in subsection 6(1.1), it is most unreasonable to expect anyone to interpret paragraph 6(1)(*b*) as referring and being limited to them *implicitly*. Secondly, the criterion of termination of flight relates to jurisdiction to try the particular offences prescribed in the *Hague* and *Montreal Conventions* only, and they are dealt with in subsection 6(1.1), not 6(1), of the *Criminal Code*. Paragraph 6(1)(*b*), therefore, seems to exceed the bounds of customary and conventional international law in using the place of termination of flight of an aircraft as a basis for applying the criminal law of Canada generally to all criminal conduct on foreign aircraft outside Canada. The United Kingdom implemented the *Tokyo Convention* by enacting the *Tokyo Convention Act*, 1967, to provide only in respect of acts or omissions taking place "on board a British controlled aircraft...." (This is now replaced but unchanged in that respect by section 92 of the British *Civil Aviation Act, 1982*.)

RECOMMENDATION

24. That paragraph 6(1)(*b*) of the *Criminal Code* be deleted or that it be amended to apply to Canadian citizens only.

Subparagraph 6(1)(*a*)(ii) of the *Criminal Code* also seems to exceed the extent to which Canada may, under the *Tokyo Convention*, or indeed under principles of international law, apply its criminal law and prosecute people for conduct committed on board aircraft outside Canada.

That subparagraph applies Canadian criminal law to all indictable conduct of everyone on board non-Canadian aircraft in flight outside Canada if the aircraft simply happens to be leased and operated by any lessee who is qualified to be registered as owner of any aircraft registered in Canada. For example, if such a qualified person were to lease an aircraft registered in Japan, and fly it over China, and if an Englishman (passenger) on board were to steal money from an American, the offender (as the *Code* now reads) commits an offence under the *Criminal Code* and can be tried by Canadian criminal courts. The flight in question need not even terminate in Canada for it to attract the applicability of all indictable offence-creating provisions of the *Criminal Code*. If it were *accused persons* whom the statutory provision is describing in terms of persons qualified to be registered as owners of aircraft under Canadian regulations, then extraterritorial jurisdiction of Canadian courts could be justified on that ground under the nationality principle of international law because of the Canadian status of the lessee.[101] However, since that is not so, it is difficult to see how the broad reach of subparagraph 6(1)(*a*)(ii) can be justified internationally under principles of international law or the *Tokyo Convention*, or why a connection between Canada and such a remote and tenuous incident should attract the application of Canadian criminal law generally, as distinct, say, from the specific offence of hijacking which is already covered under section 76.1 and subsection 6(1.1) of the *Criminal Code*. As will be seen below, the basis of jurisdiction stated in subparagraph 6(1)(*a*)(ii) of the *Criminal Code* is similar to the basis of jurisdiction stated in Article 4(1)(c) of the *Hague Convention* and Article 5(1)(d) of the *Montreal Convention*. That is, all of them base jurisdiction on a close relationship between the lessee of the aircraft and the *forum* state. Furthermore, even if the Hague and Montreal wording were used in subparagraph 6(1)(*a*)(ii), it (status of the operator of the aircraft) would not be a valid basis of jurisdiction (over all indictable offences) under any principle of international law, or under the *Tokyo Convention* that subparagraph 6(1)(*a*)(ii) is supposed to implement. That wording from the *Hague* and *Montreal Conventions* would only be a valid basis of jurisdiction to put in subsection 6(1.1) of the *Criminal Code* in respect of the particular offences of hijacking and offences endangering the safety of aircraft.

RECOMMENDATION

25. That subparagraph 6(1)(*a*)(ii) of the *Criminal Code* be deleted.

II. Hijacking — *Hague Convention*

Another defect in the present provisions of the *Criminal Code* dealing with offences committed on aircraft is the absence of a provision that is necessary to fulfil Canada's obligations to implement Articles 1 and 2 of the *Hague Convention* concerning aircraft hijacking. Articles 1 and 2 read:

> Article 1
>
> Any person who on board an aircraft in flight:
>
> (*a*) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or
>
> (*b*) is an accomplice of a person who performs or attempts to perform any such act
>
> commits an offence (hereinafter referred to as "the offence").
>
> Article 2
>
> Each Contracting State undertakes to make *the offence* punishable by severe penalties. [Emphasis added]

The provision of the *Criminal Code* of Canada that is supposed to implement Article 2 of the *Hague Convention* is section 76.1 which reads:

> **76.1** Every one who, unlawfully, by force or threat thereof, or by any other form of intimidation, seizes or exercises control of an aircraft *with intent*
>
> (*a*) to cause any person on board the aircraft to be confined or imprisoned against his will,
>
> (*b*) to cause any person on board the aircraft to be transported against his will to any place other than the next scheduled place of landing of the aircraft,

> (*c*) to hold any person on board the aircraft for ransom or to serve against his will, or
>
> (*d*) to cause the aircraft to deviate in a material respect from its flight plan,
>
> is guilty of an indictable offence and is liable to imprisonment for life. 1972, c. 13, s. 6. [Emphasis added]

When the present section 76.1 of the *Criminal Code* was being considered by the House of Commons as part of *Bill C-2*, Mr. John T. Keenan (General Counsel, Canadian Air Line Pilots Association) appeared before the Justice and Legal Affairs Committee on 10 May, 1972. He said in part:

> In Section 76.1, defining the crime of unlawful seizure of aircraft, we are concerned about ... the qualification of intention included in paragraphs (*a*) to (*d*) .... [T]hese qualifications do not exist in the *Hague Convention* and I do not see any need for them as drafted now.[102]

We would go further and say that in prescribing, as an essential ingredient of the offence of hijacking, a requirement that the accused must have acted with *intent* to do one or more of the things specified in paragraphs (*a*) through (*d*) of section 76.1, Canada has not fulfilled the requirement of Article 2 of the *Hague Convention* to make *the offence* described in Article 1 punishable *regardless of intent*. Under the Convention, Canada has no discretion in this matter.

RECOMMENDATIONS

26. That the substance of section 76.1 be amended to create the clear offence of hijacking by deleting from section 76.1 the words "with intent" in the third line, and deleting all of paragraphs (*a*) through (*d*), so that the section will read:

> **Every one on board an aircraft in flight who, unlawfully, by force or threat thereof, or by any other form of intimidation, seizes or exercises control of the aircraft is guilty of an indictable offence and is liable to imprisonment for life.**

27. If the intended results mentioned in paragraphs (*a*) through (*d*) of section 76.1 of the *Criminal Code* are to be made punishable, we recommend that this be done by converting them into a specific offence or specific offences separate and apart from *the offence* of unlawfully seizing or exercising control of an aircraft in flight (hijacking).

Since the offence of hijacking created by section 76.1 of the *Criminal Code* is made applicable outside Canada (by paragraph 6(1.1)(*a*) of the *Criminal*

Code) only when committed "in flight," our proposed amendment of section 76.1 need not be qualified by the words "in flight" in order to comply with the first line of Article 1 of the *Hague Convention*.

Another apparent defect in the *Criminal Code* provisions concerning offences on aircraft is the failure to implement paragraph 1 of Article 4 of the *Hague Convention* which reads:

> Article 4
>
> 1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over *the offence and any other act of violence against passengers or crew* committed by the alleged offender *in connection with the offence*, in the following cases: [Emphasis added]
>
> (a) when the offence is committed on board an aircraft registered in that State;
>
> (b) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;
>
> (c) when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.
>
> 2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.
>
> 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Paragraph 6(1.1)(*a*), even with the aid of subsection 6(3) of the *Criminal Code*, by speaking only of the offences in section 76.1 and 76.2, fails to implement Article 4 of the *Hague Convention* in three respects. These are discussed, and recommendations for corrections are made in the immediately following paragraphs.

First of all, paragraph 6(1.1)(*a*) and subsection 6(3) do not confer jurisdiction on Canadian courts to try "the offence" of hijacking defined in Article 1 of the *Hague Convention*, namely, an offence not conditional on the accused's having had an intent to do specific things. (This defect would be cured if our recommended redraft of 76.1 were adopted.)

Secondly, the provisions of the *Criminal Code* do not confer jurisdiction on Canadian courts to try the *Hague Convention* offence of "any other act of violence against passengers or crew ... *in connection with the offence*" (of hijacking). The reference in subsection 6(1.1) to paragraph 76.2(*a*) does not cure the defect because the assault there referred to is described as one "that is likely to endanger the safety of the aircraft," rather than one that is committed "in connection with the offence of hijacking." In fact, paragraph 76.2(*a*) relates to Article 1(1)(a) of the *Montreal Convention*, not to the *Hague Convention*. There could be a serious assault on a passenger (in connection with the hijacking) that did not "endanger the safety of the aircraft" and therefore would not be an offence under paragraph 76.2(*a*) of the *Criminal Code* when committed on an aircraft outside Canada as described in paragraph 6(1.1)(*a*) of the *Criminal Code*.

RECOMMENDATION

28. That, to implement Article 4(1) of the *Hague Convention for the Suppression of Unlawful Seizure of Aircraft* (1970), a new provision be inserted in the *Criminal Code* (perhaps as a subsection to section 76.1) to create an offence of "acts of violence in connection with a hijacking of an aircraft."

Thirdly, the expressed basis of applicability under *Criminal Code* subsection 6(1.1) (of the offender being "found anywhere in Canada") implements paragraph 2 of Article 4, but it is only one of several bases prescribed in Article 4 of the *Hague Convention*. In fact none of the bases (a), (b) and (c) prescribed in paragraph 1 of Article 4 of the *Hague Convention* are mentioned in subsection 6(1.1) of the *Criminal Code*. That omission could have a bearing in law as to whether or not certain conduct by a person outside Canada constituted — say, for extradition purposes — an offence under Canadian law if the person is not found in Canada — but is, say, found in the U.S.A. — after having forcefully seized control of an aircraft outside Canada. Furthermore, since by definition in subsection 6(1.1) the act outside Canada does not amount to an offence under the *Criminal Code* until the accused is *subsequently* found in Canada, subsection 6(1.1) could be inconsistent with paragraph 11(*g*) of the *Charter of Rights* and therefore of no force and effect pursuant to subsection 52(1) of the *Constitution Act, 1982*. Similar comments in the context of the *Montreal Convention* and subsection 6(1.1) of the *Criminal Code* appear later in this chapter.

RECOMMENDATION

29. That the General Part of the *Code* be amended to provide the several bases of trial jurisdiction prescribed in subparagraphs (a), (b) and (c) of paragraph 1 of Article 4 of the *Hague Convention* for the offence of aircraft hijacking and the offence of violence in connection with the hijacking of an aircraft.

III. Endangering Safety of Aircraft — *Montreal Convention*

Articles 1(1) and 3 of the *Montreal Convention*[103] read:

Article 1

1. Any person commits an offence if he unlawfully and intentionally:

(a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or

(b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or

(c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or

(d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or

(e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

Article 3

Each Contracting State undertakes to make the offences mentioned in Article 1 punishable by severe penalties.

Section 76.2 of the *Criminal Code* is intended to implement Articles 1 and 3 of the *Montreal Convention*. (For the text of section 76.2, see Appendix A to this Paper.)

It is noted that the word "intentionally" that appears in the *Montreal Convention* does not appear in the *Criminal Code* provision. That omission is probably of no consequence from the point of view of the validity of the section of the *Code* in respect of offences committed *in* Canada. However, it could well be a defect that affects the legality under international law of prosecuting, before a Canadian court, a non-Canadian citizen charged with an offence under section 76.2 and subsection 6(1.1) of the *Criminal Code* allegedly committed on, or in respect of, an aircraft outside Canada, that is not registered in Canada, that does not land in Canada, and that is not one described in Article 5(1)(d) of the *Montreal Convention*; in other words when the prosecution is based only on the fact that the accused was "found in Canada" under section 76.2 of the *Code*. It seems clear that the *Montreal Convention* would justify the exercise of jurisdiction by a Canadian court simply on the basis of the alleged offender being present (found) in Canada but *only* where the alleged offence was done *intentionally*. The state of which the accused is a national might therefore have a valid basis for claiming against Canada for compensation for a wrong done to its national by a Canadian prosecution in which, contrary to international law, "intention" was not alleged and proved.

It follows that, with regard to the applicability of any provision of section 76.2 to conduct outside Canada, the *Criminal Code* should specify that the proscribed conduct must have been done "intentionally." The qualifications of "knowledge" or "recklessness" mentioned in *R.* v. *City of Sault Ste. Marie*[104] will not suffice. Furthermore, from the points of view of uniformity and simplification of drafting, it would be preferable to make the qualification of "intention" applicable to offences against section 76.2 *in* Canada as well as outside Canada.

RECOMMENDATION

30. That, to implement Article 1(1) of the *Montreal Convention* of 23 September 1971, subsection 6(1.1) of the *Criminal Code* be amended to limit the extraterritorial applicability of section 76.2 of the *Criminal Code* to things done *intentionally*.

A further obligation on Canada under the *Montreal Convention* — to confer jurisdiction in accordance with Article 5(1) of that *Convention* — does not seem to have been discharged in the provision of the *Criminal Code* that was intended to do so, namely subsection 6(1.1). Article 5 of the *Montreal Convention* reads:

> 1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offences in the following cases:
>
> (a) when the offence is committed in the territory of that State;
>
> (b) when the offence is committed against or on board an aircraft registered in that State;
>
> (c) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;
>
> (d) when the offence is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.
>
> 2. Each Contracting State shall *likewise* take such measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1, paragraph 1(a), (b) and (c), and in Article 1, paragraph 2, insofar as that paragraph relates to those offences, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article. [Emphasis added]

The use of the word "likewise" in paragraph 2 of Article 5 should be noted; given its meaning of *similarly*, *also*, *too*, or *moreover*, there can be little doubt that the basis of jurisdiction required by paragraph 2 of Article 5 is not an overall basis that includes the bases required to be established by states by paragraph 1 of Article 5; it is an additional basis. It should also be noted that the word "jurisdiction" is used in Article 5 of the convention to include both the authority of the state to make laws and the jurisdiction of its courts to conduct trials.

With a view to implementing Article 5 of the *Montreal Convention*, subsection 6(1.1) of the *Code* enacts the criterion of the alleged offender's being "found anywhere in Canada" (and thereby substantially implements paragraph 2 of Article 5 of the *Montreal Convention*), but does *not* enact the criteria expressly required by paragraph 1 of Article 5 of the *Montreal Convention*. (For the text of subsection 6(1.1), see Appendix A of this Paper.) This may be a serious defect, for, as we mentioned in connection with the *Hague Convention*, the failure of the *Criminal Code* to adopt the jurisdictional criteria of the *Convention* could have legal implications with respect to whether or not certain conduct outside Canada is an offence under Canadian law. For example, it could be argued that even if the accused were a Canadian, he could not be extradited to Canada because legally he has not committed an offence under subsection 6(1.1) until he "is found ... in Canada."[104] The same holds true in the context of the *Montreal Convention*; for example it is doubtful that conduct described in paragraph 76.2(*b*) of the *Criminal Code* that occurs outside Canada in the circumstances mentioned in Article 5(1)(d) of the *Montreal Convention* would be an offence where the offender is not "found in Canada." In our view, the answer to the question as to whether or not a crime has been committed should not turn on whether or not the offender is *subsequently* found in Canada. The proscribed extraterritorial conduct should be defined as an offence in the *Criminal Code*; separately, the bases of jurisdiction to try the offence should be stated in the *Criminal Code*.

RECOMMENDATION

31. That the text of subsection 6(1.1) of the *Criminal Code* be changed substantially to reflect the criteria on which the *Montreal Convention* authorizes Canadian criminal law to be applied.

In the interests of completeness we should add that we are, of course, aware of paragraph 3 of Article 5 of the *Montreal Convention* which reads: "This Convention does not exclude any criminal jurisdiction exercised in accordance with national law." That provision must surely be based on the assumption that such jurisdiction would be exercised in accordance with principles of international law; as we know, they do not give a state an unqualified right to apply its criminal law to conduct outside its borders.

To sum up our views at this time, we feel that the structure and wording of sections 76.1 and 76.2 and subsections 6(1) and (1.1) should be revised and redrafted to ensure that:

(a) they completely discharge Canada's treaty obligations in respect of offences on and in respect of aircraft, and

(b) they do so in a way and with words that clearly and accurately

  (i) create the offence of hijacking and offences of endangering the safety of aircraft, and

(ii) separately confer trial jurisdiction on Canadian courts

on the bases prescribed in the *Tokyo*, *Hague* and *Montreal Conventions*.

IV. Jurisdiction of Courts over Aircraft Offences

We have seen that subsections (1), (1.1) and (1.2) of section 6 of the *Criminal Code* apply certain *offence provisions* of the *Criminal Code* to conduct on aircraft.

The *jurisdiction of courts* in Canada to try offences committed on aircraft is provided for in widely separated subsection 6(3) and paragraph 432(*d*) of the *Criminal Code*. These provisions read in part:

> **6.** (3) Where a person has committed an act or omission that is an offence by virtue of subsection (1), (1.1), (1.2) ..., the offence is within the competence of and may be tried and punished by the court having jurisdiction in respect of similar offences in the territorial division where he is found in the same manner as if the offence had been committed in that territorial division.

> **432.** For the purposes of this Act, ...
>
> (*d*) where an offence is committed in an aircraft in the course of a flight of that aircraft, it shall be deemed to have been committed
>
> (i) in the territorial division in which the flight commenced,
>
> (ii) in any territorial division over which the aircraft passed in the course of the flight, or
>
> (iii) in the territorial division in which the flight ended.

Earlier in this Paper, with a view to pointing up the distinction between a legislative provision that extends the applicability of offence-creating sections outside Canada, and a provision that extends the jurisdiction of courts in Canada to try offences committed outside Canada, we mentioned that legislative draftsmen sometimes draft an offence-creating provision in a statute but then overlook the necessity to draft a provision to confer jurisdiction on courts to try accused who commit the offence. At this point we would like to point out that, insofar as the jurisdiction provision is concerned, it could take the form of what we might call a *basic* jurisdiction provision to confer "power to try (particular) indictable offences" — and thereby fulfil the condition precedent required by section 428 of the *Criminal Code* before a Canadian court may try a person for one of those particular offences. In other words section 428 requires that the courts must have been given jurisdiction over the *offence*, before the jurisdiction over the *person* therein conferred, can be exercised by the court. Or the provision could take the form of a *venue* provision specifying *which* courts in Canada may exercise the "Canadian" jurisdiction over those offences. In the context of offences committed on aircraft, inasmuch as subsection 6(1) deems offences committed in certain aircraft outside Canada to have been committed in Canada, that subsection not only extends the applicability of Canadian offence-creating sections to aircraft outside Canada but it also is a basic jurisdiction section in that it implicitly makes subject to trial, by courts in Canada, offences under subsection 6(1) that are committed outside Canada. If Parliament had merely deemed those offences to have been committed in Canada, and had said no more in section 6 about jurisdiction of courts, subsection 6(1) could have been implemented through the medium of paragraph 432(*d*) (a statutory exception to section 428). Paragraph 432(*d*) is a venue provision specifying *which* courts in Canada have jurisdiction to try offences committed in aircraft *in* Canada. However, as we have seen, Parliament enacted a further venue provision in this regard, namely, subsection 6(3).

The coexistence of these two venue sections (subsection 6(3) and paragraph 432(*d*)) raises the question whether both of them are to apply or whether one only of them is to apply in respect of offences under subsection 6(1) committed on an aircraft whether outside Canada or in Canada.

Given that subsection 6(1) describes offences committed in aircraft outside Canada, it is obvious that subsection 6(3) is a venue provision for Canadian courts in respect of those offences committed *outside* Canada.

Furthermore, given (a) that paragraph 432(*d*) does not expressly refer to offences committed outside Canada; (b) the general rule as to the territorial limitation of our criminal law; and (c) the provision in subsection 5(2) that "subject to this Act ... no person shall be convicted for an offence committed outside of Canada," it is reasonable to conclude that 432(*d*) is a venue provision for Canadian courts in respect of offences committed in Canada *only*, even though the actual wording of paragraph 432(*d*) does not expressly so limit the provision.

However, interpreting subsection 6(3) as a venue provision for offences committed outside Canada, and paragraph 432(*d*) as a venue provision for offences committed inside Canada (probably offences *only inside* Canada) still leaves us with difficulties arising out of the wording of subsection 6(3) when read in conjunction with subsection 6(1).

One of the difficulties or defects is that it is not clear whether subsection 6(3) is meant to supplant paragraph 432(*d*) as a venue provision for the trial of offences under subsection 6(1) committed on aircraft *outside* Canada but *deemed to have been committed in Canada*. Given that subsection 6(1) deems offences committed on aircraft in flight outside Canada to have been committed *in* Canada, and given that paragraph 432(*d*) prescribes which courts in Canada have jurisdiction to try offences committed in aircraft in flight *in* Canada, it follows that, in the absence of any provision to the contrary, paragraph 432(*d*) specifies which courts have jurisdiction in respect of offences in aircraft under subsection 6(1). On the other hand, it could be argued that subsection 6(3), being part of the same section as subsection 6(1) was intended to be exhaustive of the distribution of court jurisdiction (venue) in Canada to try offences under subsection 6(1), and that 432(*d*) is therefore not applicable to them. Yet, in retort one could say that since subsection 6(1), by its very wording is applicable to acts or omissions *in* Canada as well as outside Canada, it is only reasonable that the venue provisions in respect of offences *in* Canada, namely those in paragraph 432(*d*), apply to all offences under subsection 6(1).

In any event, and whether or not the words "in or" (in the phrase "in or outside of Canada" in subsection 6(1)) were intentionally inserted there, they make no sense in their present context; that is, it seems to make no sense for the *Code* to say that an act or omission that has been committed in Canada is deemed to have been committed in Canada.

Another difficulty we find (when comparing subsection 6(3) with paragraph 432(*d*)) is that while both provisions have substantially the same object, namely, to state which courts in Canada are competent to try offences committed in aircraft, the different forms of wording used in the two provisions contribute to difficulty in trying to understand whether they are mutually exclusive, complementary or partly both. In this connection it will be seen that subsection 6(3) is speaking in terms of "in the same manner as if the offence had been committed in that territorial division," whereas 432(*d*) is speaking in terms of "shall be deemed to have been committed in the territorial division." The latter language is akin to that used in subsection 6(1) which deals *not* with venue but rather with extending outside Canada other offence-creating sections of the *Criminal Code*.

RECOMMENDATION

32. As an interim measure pending the enactment of a new *Criminal Code*, and with a view to simplifying and clarifying the law and, to that extent at least, improving it, we recommend that (a) the words "in or" be removed from subsection 6(1), thus leaving 6(1) and 6(3) to deal with court jurisdiction over offences committed only in aircraft *outside* Canada; (b) subsection 6(3) be amended to indicate that the jurisdiction of the court in the territorial division in which the accused is found is an [alternative] [additional] jurisdiction to that prescribed in paragraph 432(*d*); and (c) subsection 432(*d*) be amended to state that it applies to jurisdiction over offences committed in aircraft *in* Canada or offences *deemed* to have been committed *in* Canada.

This recommendation is an interim one in the sense that while we think it would improve the present *Criminal Code*, further improvements can and should be made, by completely reformulating the jurisdictional provisions in the General Part for presentation in a new *Code*. (For our recommendations in that connection see Chapter Sixteen of this Paper.)

CHAPTER SIX

Offences Committed outside Canada by People Seen to Represent Canada

We have noted that the general rule, that the applicability of our criminal law is limited to offences committed *in* Canada, has been extended to include some offences outside Canada committed in ships or aircraft registered in Canada and certain other aircraft. We will now examine the extent to which the conduct of various categories of people is subject to the *Criminal Code* of Canada (and some other statutes) when they are *outside* Canada — whether or not on ships or aircraft.

I. Public Servants of Canada

The closest that the *Criminal Code* comes to a general extraterritorial extension of its applicability is seen in subsection 6(2) which, using the criterion of the status of the offender, extends the applicability of all offences punishable by indictment (under the *Criminal Code* or any other Act of the Parliament of Canada) to certain Canadian federal public servants serving abroad; it reads:

> (2) Every one who, while employed as an employee within the meaning of the *Public Service Employment Act* in a place outside Canada, commits an act or omission in that place that is an offence under the laws of that place and that, if committed in Canada, would be an offence punishable by indictment, shall be deemed to have committed that act or omission in Canada.

This extraterritorial application of Canadian criminal law and jurisdiction complements the immunity (mentioned in Chapter Eight of this Paper) that Canadian diplomats, their staffs and families enjoy outside Canada.

In one respect we think that the scope of subsection 6(2) is too narrow in that it does not apply to all employees of the Government of Canada serving outside Canada. In another respect we think it is too broad in that it applies to employees who are aliens and who may owe no allegiance to Canada.

First, let us discuss "employees within the meaning of the *Public Service Employment Act*." Under section 39 of the *Public Service Employment Act*,[106] the Public Service Commission may, with the approval of the Governor in Council, exclude any "position or person or class of positions or persons ... from the operation of [that] Act." Such approval has been given in several Orders in Council with the result that there are persons employed by the Government of Canada who are not "employees within the meaning of the *Public Service Employment Act*," and who, therefore, do not come within the wording of subsection 6(2) of the *Criminal Code*. It appears that such exclusions were not intended by the House of Commons when it passed subsection 6(2) of the *Criminal Code* in 1976.[107] In any event we do not see why the extraterritorial *criminal* jurisdiction of Canadian courts over persons who are employees of the Government of Canada should turn on whether they are or are not classified as "employees" within the meaning of a certain Act. The criterion of being abroad on full-time business of the Government of Canada, that is, being an ordinary "employee" of the Government of Canada, would seem to be a more reasonable criterion for criminal law purposes.

RECOMMENDATION

33. That the reference to the *Public Service Employment Act* be deleted from subsection 6(2) of the *Criminal Code*.

As to subsection 6(2) being too broad in scope in applying to aliens, the drafters of subsection 6(2) may have thought that, from an international law point of view, subsection 6(2) (and 6(3) insofar as it applies to 6(2)) is/are justifiable under the protective principle and/or the nationality principle inasmuch as Canadian public servants serving abroad are there on official Canadian business and would usually be Canadian citizens, or if aliens, would at least owe allegiance to Canada.

However, an alien employed under the *Public Service Employment Act* may be excused from taking an oath of allegiance to the Queen. Pursuant to section 39 and subsection 35(1) of the Act, the Governor in Council has made the "Locally-Engaged Staff Employment Regulations,"[108] section 9 of which requires Canadian citizens (but not aliens) employed under the Regulations to take the oath of allegiance required by section 23 of the *Act*. Another example of employees being exempted from taking the oath of allegiance is found in the "Certain Term Employees Exclusion Approval Order" which so exempts persons appointed to the public service of Canada for specified terms of less than six months duration to perform duties that are not of a confidential nature or vital to national security.[109]

Given such Orders in Council, the reach of subsection 6(2) of the *Criminal Code* would seem to exceed that authorized by international law. In other words, the combined effect of such Orders in Council and subsections 6(2) and (3) of the *Criminal Code* is that aliens who may owe no allegiance to Canada may be tried by a Canadian court for criminal offences committed outside the scope or performance of their duties against anyone in foreign countries. Such jurisdiction would seem to exceed the bounds of the nationality and protective principles of international law and could give rise to a claim against Canada by the state of which the accused is a national. Indeed, an attempt by a Canadian court to exercise such jurisdiction over an alien could give rise to a plea by the accused that, since the prosecution is contrary to principles of international law, the prosecution is not in accordance with the principles of fundamental justice and therefore contravenes a right of the accused under section 7 of the *Canadian Charter of Rights and Freedoms*. Although such a prosecution is unlikely to arise in practice, certainly extradition to Canada would not likely be granted by another state. The possibility of such contraventions of international law and the *Charter* should be precluded by amending the wording of the *Criminal Code*.

RECOMMENDATION

34. That subsection 6(2) of the *Criminal Code* be amended to prescribe clearly an applicability consistent with principles of international law, namely that any employee of the Government of Canada serving outside Canada who commits an act or omission outside Canada:

- **(a) on federal government property (territorial and protective principles);**
- **(b) against the security or property of Canada (protective principle);**
- **(c) in the course of his employment (protective principle);**
- **(d) within the scope of his employment (protective principle);**
- **(e) while he is a citizen of Canada (nationality principle); or**
- **(f) while he owes allegiance to [Canada] [Her Majesty the Queen in right of Canada] (nationality principle);**

commits an offence under the law of Canada and also under the law of the country where the act or omission took place, and may be tried by a Canadian court for that offence.

II. Members of Canadian Armed Forces

In addition to Canadian federal public servants, there is a large class of people to whom the criminal law of Canada is even more generally applicable outside Canada, namely persons subject to the *National Defence Act*'s Code of Service Discipline (including certain dependants and civilian personnel).[110] The *Criminal Code* does not mention that they are subject to trial by Canadian military tribunals for offences under the *Criminal Code* and other Canadian federal statutes committed abroad, and that they are subject to trial by Canadian criminal courts in Canada for such offences committed abroad. As noted in Chapter Thirteen of this Paper, members of the Canadian Forces serving outside Canada, members of their civilian components (for example, civilian employees) and dependants of either, accompanying them, are in many cases exempt under international agreement from the criminal jurisdiction of the courts of *North Atlantic Treaty* countries.

RECOMMENDATION

35. In the interests of uniformity of presentation of the law and ease of finding it, we recommend that the General Part of a new *Criminal Code* mention that pursuant to the *National Defence Act* persons subject to the Code of Service Discipline may be tried

(a) by civil courts in Canada for offences against the *Criminal Code* or any other Act of the Parliament of Canada committed in or outside Canada,

(b) by Canadian military tribunals outside Canada for offences committed in or outside Canada against the *Criminal Code* or any Act mentioned in (a), and

(c) by Canadian military tribunals in Canada for offences committed in or outside Canada against the *Criminal Code* or any Act mentioned in (a) except for murder, manslaughter, sexual assault under sections 246.1

through 246.3 of the *Criminal Code*, and abduction under sections 249 through 250.2 of the *Criminal Code*.

III. Crews of Ships Registered in Canada

Recommendation 18, for amendments to the *Canada Shipping Act* and the *Criminal Code* in respect of offences by crews of Canadian ships outside Canada, appears in Chapter Four of this Paper.

IV. Members of Royal Canadian Mounted Police

Members of the Royal Canadian Mounted Police are subject to trial (in Canada or *outside* Canada) for *disciplinary* offences committed outside Canada; however, *Criminal Code* offences are *not* applicable to them *qua* R.C.M.P. members outside Canada.[111] We see no reason for this. When they are serving at embassies and other diplomatic missions of Canada in other countries, they and accompanying members of their household usually enjoy certain immunities from local criminal jurisdiction (as outlined in Chapter Eight of this Paper). To replace that immunity, and to justify applications for their extradition to Canada in appropriate cases, this gap in applicability of Canadian criminal law and jurisdiction should be filled.

RECOMMENDATION

36. That members of the Royal Canadian Mounted Police, like federal public servants, be subject to trial for indictable offences under the *Criminal Code* and other federal statutes committed by them while serving outside Canada, and that the *Criminal Code* so provide in respect of them, and in respect of members of their household to the extent of the immunity of the latter from criminal jurisdiction of host states.

CHAPTER SEVEN

Offences Committed outside Canada by Canadian Citizens

I. The *Criminal Code*

Although Canada could justifiably, under the nationality principle of international law, provide in its legislation that its criminal law be applicable to Canadian citizens wherever they might be, Canada has not done so. Rather, in only three instances has Parliament enacted in the *Criminal Code* that acts or omissions of Canadian citizens abroad attract the applicability of Canadian criminal law. They are: certain offences against internationally protected persons (paragraph 6(1.2)(*c*)), treason (subsection 46(3)), and bigamy (paragraph 254(1)(*b*)).

Although some sovereign states have, in addition to relying basically on the territorial principle, legislatively provided for the general applicability of their criminal law to their nationals or citizens wherever they might be,[112] we see no need for Canada to do so. Indeed, we think that it would be wrong in principle to enact legislation to make all Canadian citizens outside Canada generally subject to Canadian criminal law. Many of them were born outside Canada and many permanently reside outside Canada with little or no thought of returning here.[113] We think that Canada is right in applying its criminal law generally to certain classes of people (such as public servants of Canada and members of the armed forces of Canada) while they serve abroad on Canadian public business, and in applying it to other Canadian citizens in respect only of offences related to that citizenship (such as treason) or offences committed by them in certain geographical areas in which Canada exercises sovereign rights under international law, such as the fishing zones of Canada.

As far as *jurisdiction of Canadian courts* to try Canadian citizens for extraterritorial offences is concerned (as distinct from the extraterritorial applicability of the offence sections), express provision is found in subsections 6(1.2) and (3) of the *Criminal Code* for the trial of offences by Canadian citizens against internationally protected persons. However, there are no counterpart jurisdictional provisions in respect of treason or bigamy[114] by Canadian citizens outside Canada.

In this connection it will be recalled that subsection 5(2) of the *Criminal Code* reads: "Subject to this Act or any other Act of the Parliament of Canada, no person shall be convicted in Canada for an offence committed outside of Canada." Since sections 46 (treason) and 254 (bigamy) are offence-creating sections that do not confer trial jurisdiction on any court, that is, they do not "deem" the offences to have been committed in Canada, therefore those sections are *not*, at least *not clearly*, exceptions to the limitation on *trial jurisdiction* enacted in subsection 5(2).

At first glance, section 428 of the *Criminal Code* would appear to provide for the jurisdiction of courts to try all indictable offences including extraterritorial ones. That section reads in part:

> Subject to this Act [i.e. including subject to subsection 5(2)] every superior court of criminal jurisdiction and every court of criminal jurisdiction that has power to try an indictable offence is competent to try an accused for that offence
>
> (*a*) if the accused is found, is arrested or is in custody within the territorial jurisdiction of the court; ...

However, given that section 428 is subject to subsection 5(2), and given the language used by Parliament to state the exceptions to subsection 5(2) that appear as subsections 6 (2) and (3), and 423 (4) and (5), it is difficult to see how the entirely different wording used in section 428 could have been intended by Parliament or should be construed to have the same result.

Whether the rule of "closest connection" of the offence with the forum state, and the rule of "reasonableness" of the forum's exercising jurisdiction, are rules of practice or rules of law, it is axiomatic that unless Parliament has conferred criminal jurisdiction on Canadian courts to try an offence,[115] a Canadian court could not try it even where, after considering the competing interests of Canada and another state, the court decided that:

(a) the interests of Canada were paramount, and

(b) Canada could justify the exercise of extraterritorial jurisdiction based on the international law principle of "nationality" (of the accused) as refined by the principle of "reasonableness."

We therefore feel that the *Criminal Code* should clearly confer jurisdiction on Canadian courts to try all the particular offences that are extraterritorial offences under Canadian statutes when committed abroad by Canadian citizens. We feel that that is necessary even though in a particular case the Attorney General concerned may decide to waive prosecution, or the Canadian court concerned may abstain from exercising jurisdiction after he or it has examined the competing interests and decided that the differences should be resolved by Canada's deferring to the jurisdiction of a court of another state.

RECOMMENDATION

37. That the General Part of the *Criminal Code* expressly provide for the jurisdiction of courts in Canada to try Canadian citizens for the offences of treason and bigamy when committed outside Canada.

II. Other Statutes

The *Criminal Code* is not exclusive in making Canadian citizens subject to the criminal law of Canada in respect of certain conduct outside Canada. Examples of other Acts of the Parliament of Canada that do so are:

The *Official Secrets Act*,[116] section 13 and subsection 14(1) of which read:

> **13.** An act, omission or thing that would, by reason of this Act, be punishable as an offence if committed in Canada, is, if committed outside Canada, an offence against this Act, triable and punishable in Canada, in the following cases:
>
> (*a*) where the offender at the time of the commission was a Canadian citizen within the meaning of the *Canadian Citizenship Act*; or
>
> (*b*) where any code word, pass word, sketch, plan, model, article, note, docu-

> ment, information or other thing whatever in respect of which an offender is charged was obtained by him, or depends upon information that he obtained, while owing allegiance to Her Majesty.
>
> **14.** (1) For the purposes of the trial of a person for an offence under this Act, the offence shall be deemed to have been committed either at the place in which the offence actually was committed, or at any place in Canada in which the offender may be found.

The *Foreign Enlistment Act*[117] sections 3 and 16 of which read:

> **3.** Any person who, being a Canadian national within or outside Canada, voluntarily accepts or agrees to accept any commission or engagement in the armed forces of any foreign state at war with any friendly foreign state, or, whether a Canadian national or not, within Canada, induces any other person to accept or agree to accept any commission or engagement in any such armed forces, is guilty of an offence under this Act.
>
> **16.** For the purpose of giving jurisdiction in criminal proceedings under this Act, every offence shall be deemed to have been committed, every cause or complaint to have arisen either in the place in which the same was committed or arose, or any place in which the offender or person complained against may be.

As the *Official Secrets Act* and the *Foreign Enlistment Act* will be reviewed by this Commission at a later date in the context of offences against the state, they are not examined here in any detail. However, we can make the following recommendation at this time.

RECOMMENDATION

38. That the *Foreign Enlistment Act* and *Official Secrets Act* and other Acts which create extraterritorial offences, and confer extraterritorial jurisdiction on

Canadian courts, be reviewed by the Departments of Justice and External Affairs and amended as necessary to ensure that when provisions of different Acts are to convey the same meaning, they should have uniformity of expression, and accuracy and consistency in terminology; for example, that the expression "Canadian citizen" be used rather than "Canadian national"; and perhaps "for the purpose of giving jurisdiction in criminal proceedings" rather than "for the purposes of the trial."

CHAPTER EIGHT

Offences Committed outside Canada by Anyone

I. The *Criminal Code*

The *Criminal Code* creates very few extraterritorial offences for which anyone committing them outside Canada is punishable; included among them are the extraterritorial offences, against Canadian national interests, of forging or uttering forged Canadian passports, and the offence of fraudulently using certificates of citizenship. These offences are created by sections 58 and 59 of the *Criminal Code* and they are in keeping with the international law protective principle.

Our only comment in respect of sections 58 and 59 is that, like the bigamy and treason sections, they fail to provide for the jurisdiction of courts in Canada to try them. While it might be argued that Canadian criminal courts have common law jurisdiction to try the extraterritorial offence of treason (although given that English statutory law was enacted to provide the courts in England with such jurisdiction there must be a doubt in that regard),[118] it is difficult to see on what legal basis a court in Canada could, in the face of subsection 5(2) of the *Criminal Code*, try anyone — be he a Canadian citizen or an alien — for say, forging a Canadian passport in Japan. As has been emphasized by courts and jurists previously referred to in this Paper, before there can be a prosecution and conviction there must not only be "an extraterritorial offence" (which there is, under section 58 or 59), but also extraterritorial jurisdiction vested in courts to try the offence. The latter seems to be lacking in respect of sections 58 and 59 since they do not even "deem" the conduct abroad to have occurred in Canada.

RECOMMENDATION

39. That the General Part of the *Criminal Code* expressly provide for the jurisdiction of courts in Canada to try anyone for offences under sections 58 and 59 when committed outside Canada.

II. Offences Relating to Currency

In Part X of the *Criminal Code* (offences relating to currency), we find it strange that sections such as 407 (making counterfeit money), 410 (uttering counterfeit money) and 411 (uttering counterfeit coins) are not applicable to everyone outside Canada in respect of Canadian currency.

In view of subsection 5(2) of the *Criminal Code* and the general principle that acts or omissions outside Canada do not, in the absence of statutory language to the contrary, constitute criminal offences in Canada, it seems quite clear that sections 407, 408, 409, 410(*a*) and 411 are *not* applicable to conduct totally outside Canada, although they are applicable to conduct in Canada in respect of the currency of Canada or of any other state.

In this connection we respectfully disagree with what appear to be different conclusions reached by some authors when they say that the explanation for Canada's not being a party to the *Convention for the Suppression of Counterfeiting Currency* signed at Geneva on April 20, 1929[119] "may lie in the fact that the provisions of the *Criminal Code* dealing with offences relating to currency and forgery and offences resembling forgery are so all inclusive that there is no need (for Canada) to join the Convention";[120] and that the sections of Part X of the *Criminal Code* "are very broad in scope since they include the *manufacture* of domestic (Canadian) ... currency in Canada or *abroad*...."[121] [Emphasis added] It seems clear to us that although the *Convention* would outlaw the making of counterfeit Canadian money outside Canada, the *Criminal Code* does not. Paragraph 410(*b*) of the *Criminal Code* merely makes it an offence to export, send or take counterfeit money out of Canada. Although, apart from article 9 (dealing with non-extraditable offences), the convention does *not obligate* a state to prosecute extraterritorial offences, the *Convention* does not *prohibit* such action. Examples of a state making it an offence to counterfeit its currency outside its territory are to be found in the laws of many countries.[122]

Under the protective principle of international law, the making and uttering Canadian counterfeit money by anyone outside Canada could each be made an offence against the *Criminal Code*.

RECOMMENDATION

40. That the *Criminal Code* prescribe that anyone may be prosecuted in Canada for making or uttering counterfeit Canadian currency inside or outside Canada; that is, make applicable outside Canada the relevant offence-creating provisions of the *Criminal Code*, and confer jurisdiction on Canadian courts to try such extraterritorial offences.

III. Universal Crimes

There are a number of acts or omissions which, under the universality principle of international law,[123] are universal crimes for which the offender may be tried and punished in any state though the offence was committed outside its territory. An examination of Canada's position regarding such crimes, with a view to seeing whether our domestic law gives effect to our international rights and obligations, and to what extent these crimes remain to be incorporated in our law, would require separate study as in the case of other specific offences. However some such crimes are examined here (albeit cursorily) because of their relationship to the *Criminal Code* and because it is important to discuss certain apparent jurisdictional and other defects in the *Criminal Code* and other legislation in respect of them.

IV. Piracy

The oldest of the universal crimes is piracy. Piracy has been made a crime under Canadian law by section 75 of the *Criminal Code* which defines it as "any act that, by the law of nations, is piracy." The offence has been defined in Article 15 of the 1958 *Geneva Convention on the High Seas*[124] and repeated in Article 101 of the 1982 *United Nations Convention on the Law of the Sea*[125] which, though not yet ratified by Canada, may safely be regarded as reflecting customary international law or the law of nations in this regard. Article 15 reads:

> Piracy consists of any of the following acts:
>
> (1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
>
> (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
>
> (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
>
> (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
>
> (3) Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article.

The definition, it will be noted, includes illegal acts against aircraft as well as against ships; but only acts that have been committed by crews or passengers *against other ships or other aircraft* constitute piracy. At common law the offence of piracy also covered certain acts by the crew and passengers against the ship to which they belonged,[126] and covered "frustrated attempts to commit piratical robbery."[127] Although section 8 of the *Criminal Code* has abolished common law offences, those acts and attempts now appear to be covered to some extent in Canadian law by section 76 of the *Criminal Code*. However, to what extent that is so, and to what extent sections 76, 76.1 and 76.2 of the *Criminal Code* implement the three paragraphs of the definition of piracy quoted above is far from clear.

At the moment, the *Criminal Code*, by incorporating the law of nations (international law) definition of piracy in section 75, makes piracy against *aircraft* an offence under section 75 without indicating how that offence differs from the offences relating to aircraft under sections 76.1 and 76.2. Those last two sections would certainly duplicate or overlap some of the "illegal acts of violence, detention or depredation" that constitute the offence of piracy against aircraft under section 75. As we have mentioned on previous occasions, overlapping of offence sections should be avoided.

RECOMMENDATION

41. Accordingly, that sections 75, 76, 76.1 and 76.2 be examined as a group by the Department of Justice and the Department of External Affairs with a view to defining "piracy" precisely in the *Criminal Code* rather than by reference to the law of nations, and to amending the other relevant sections of the *Criminal Code* as necessary. This recommendation should, of course, be read with our earlier recommendations concerning sections 6, 76.1 and 76.2 to implement aircraft conventions to which Canada is a party.

There does not appear to be a jurisdictional provision in the *Criminal Code* in respect of the offence of piracy and piratical acts (sections 75 and 76) that is the counterpart of subsection 6 (1), (1.1) and (3) (jurisdiction) in respect of aircraft offences under sections 76.1 and 76.2.

If subsection 6(1.1) and subsection 6(3) of the *Criminal Code* were considered necessary to provide for trial jurisdiction by Canadian courts in respect of aircraft offences under sections 76.1 and 76.2 committed outside Canada, it would appear equally necessary for the *Criminal Code* to provide for the jurisdiction of courts in Canada to try extraterritorial offences relating to ships under sections 75 and 76 of the *Criminal Code*. For that reason, and the reasons that we have given earlier in this Paper in connection with the offences of treason and bigamy, and offences against passports and certificates of citizenship committed outside Canada, we make the following recommendation.

RECOMMENDATION

42. That the General Part of the *Criminal Code* expressly provide for the jurisdiction of courts in Canada to try anyone for the extraterritorial offences of piracy and piratical acts against ships.

V. War Crimes, including Grave Breaches of the 1949 *Geneva Conventions*

War crimes constitute another type of universal offence. The *United States Manual on the Law of Land Warfare*[128] states that the jurisdiction of U.S. military tribunals extends over war crimes committed against stateless persons and the nationals of allied states. The current *British Manual of Military Law*, Part III (1958) goes further and asserts that war crimes are crimes *ex jure gentium* and, as such, are triable by the courts of all states regardless of against whom the war crimes are committed.

Canada does not have a manual of military law dealing with war crimes. But there are two Canadian federal enactments that deal with this subject. The earlier one is *An Act Respecting War Crimes.*[129] We will refer to it as the "*1946 War Crimes Act*" or simply as "the Act" where the meaning is clear. Although the Act does not appear in the *Revised Statutes of Canada* 1952 or 1970, it has not been repealed. The Act itself consists of only three short sections which read:

> **1.** The War Crimes Regulations (Canada) made by the Governor in Council on the thirtieth day of August, one thousand nine hundred and forty-five, as set out in the Schedule to this Act, are hereby re-enacted.
>
> **2.** This Act shall be deemed to have come into force on the thirtieth day of August, one thousand nine hundred and forty-five, and everything purporting to have been done heretofore pursuant to the said Regulations shall be deemed to have been done pursuant to the authority of this Act.
>
> **3.** This Act shall continue in force until a day fixed by proclamation of the Governor in Council and from and after that date shall be deemed to be repealed.

Thus the substance of the Act (which has not been repealed) is left to the Regulations annexed to it.

The other Canadian federal enactment is the *Geneva Conventions Act.*[130] Although this 1970 Act does not speak of "war crimes" as such, it does make it an offence under Canadian law to commit outside Canada any of the "grave breaches" of the four 1949 *Geneva Conventions* that are attached as Schedules to the Act. Each of the Conventions has provisions that read similarly to the following ones from the *Prisoner of War Convention*:

> Article 129
>
> The High Contracting Parties undertake to enact legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention....

Article 130

> Grave breaches to which the preceding article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

The *Geneva Conventions Act* assumes that grave breaches mentioned in the 1949 *Geneva Conventions* would, if committed *in Canada*, be conduct that would constitute offences under the *Criminal Code* of Canada or other statutes, and could be prosecuted as such. At least that is what subsection 3(1) would lead one to believe since it only provides for offences *outside* Canada. It reads:

> Any grave breach of any of the *Geneva Conventions* of 1949, as therein defined, that would, if committed in Canada, be an offence under any provision of the *Criminal Code* or other Act of the Parliament of Canada, is an offence under such provisions of the *Criminal Code* or other Act if committed outside Canada.

Subsection 3(2) of the *Geneva Conventions Act* provides for the trial of the grave breach offences when committed anywhere by any person. It reads:

> (2) Where a person has committed an act or omission that is an offence by virtue of this section, the offence is within the competence of and may be tried and punished by the court having jurisdiction in respect of similar offences in the place in Canada where that person is found in the same manner as if the offence had been committed in that place, or by any other court to which jurisdiction has been lawfully transferred.

Under subsection 7(1) of the *Geneva Conventions Act* every prisoner of war is subject to the Code of Service Discipline as defined in the *National Defence Act* and is subject to trial by Canadian military tribunals for having committed any alleged grave breach of any of the 1949 *Geneva Conventions*. These military trials could be held in Canada or outside Canada.

Thus, Canada, in implementing its obligations under the 1949 *Geneva Conventions* to provide effective penal sanctions for grave breaches of those

Conventions, has divided trial jurisdiction between Canadian criminal courts and Canadian military courts, based on the status of the accused.

As seen above, the war crimes (grave breaches) covered by the 1970 Act are fairly well defined. However the war crimes covered by the 1946 Act are not.

Paragraph 2(f) of the 1946 Regulations defines "war crime" to mean "a violation of the laws or usages of war committed during any war in which Canada has been or may be engaged at any time after the 9th day of September, 1939." Such war crimes would include unlawful ways of waging war, for example bombarding civilian inhabitants of an undefended town, using poison gases, or using weapons designed to cause unnecessary suffering to the enemy. Furthermore, inasmuch as the Regulations cover all types of war crimes, they are possibly applicable to contraventions of the 1949 *Geneva Conventions* that do *not* amount to "grave breaches" of those Conventions.

The 1946 *War Crimes Act and Regulations* were enacted in Canada at a time when the *British Army Act* was applied as part of military law in the Canadian Army; hence the Regulations envisaged the trial and punishment of war criminals by courts martial convened and proceeding in accordance with that British Act and British Army Rules of Procedure. But the British Act and Rules of Procedure ceased to be applicable to the Canadian Army in 1950.[131]

There is no provision for appeal from trials under the 1946 *War Crimes Act*. There is provision for appeal under the Canadian Forces Code of Service Discipline,[132] but the only war crimes trials to which that Code would apply are trials of Canadian military personnel and military associated personnel including the trial of prisoners of war held by the Canadian Forces who are charged with war crimes that are grave breaches of the 1949 *Geneva Conventions*.

The tenor of the 1946 *War Crimes Regulations* tends to indicate that they could well have been intended to apply *only* in theatres of war, and that may explain why the *Regulations* confer jurisdiction only on Canadian military tribunals to conduct trials.

It will be noted that some of the particular rules of evidence applicable to war crime trials under the 1946 *Regulations* give much greater leeway and scope to the prosecution than is the case in prosecutions under the *Criminal Code* or the *National Defence Act*. For example War Crime Regulation 10(1) reads in part:

> At any hearing before a military court convened under these Regulations, the court may take into consideration any oral statement or any document appearing on the face of it to be authentic, provided the statement or document appears to the court

to be of assistance in proving or disproving the charge, notwithstanding that such statement or document would not be admissible as evidence in proceedings before a field general court-martial....

Obviously the existing war crimes legislation is outdated and new federal legislation is required to clarify (a) what war crimes are offences under Canadian law and (b) the jurisdiction of Canadian courts to try them. As between military and criminal courts, jurisdiction to try war crimes should perhaps be divided by giving the regular criminal courts of Canada jurisdiction to conduct trials *in* Canada in respect of war crimes that are committed anywhere by anyone (provided the accused is found in Canada), and giving jurisdiction to Canadian military tribunals to conduct trials outside Canada in respect of war crimes committed *outside* Canada by anyone. However, we must emphasize that at this stage, we are unable to make any recommendations in this connection.

RECOMMENDATION

43. That the Government of Canada authorize a study of the complex subject of war crimes including relevant aspects of international law, comparative law, constitutional law,[133] criminal law[134] and military law[135] with a view to determining what war crimes legislation should be enacted by Canada to replace our present outdated legislation. Until that study is done, any other recommendations would be premature. Regardless of who undertakes the study, the Ministry of the Solicitor General of Canada and the Departments of Justice, National Defence and External Affairs should be included as participants in it.

VI. Offences under International Treaties — General Remarks

There are a number of multilateral treaties (conventions) relating to crimes which, although they may not be declaratory of customary international law, have international criminal jurisdiction implications for the states party to them. Canada is a party to many of them: to the more recent ones as signatory; to earlier ones through being automatically bound by British treaties. The following list contains examples of both types:

(a) Conventions in respect of offences on or relating to aircraft,[136]

(b) The 1949 *Geneva Conventions* on the protection of war victims,[137]

(c) The *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons*,[138]

(d) *Convention on the Prevention and Punishment of the Crime of Genocide*,[139]

(e) Various Conventions dealing with dangerous drugs,[140]

(f) The *International Agreement for the Suppression of Slavery*,[141]

(g) The *International Convention for the Suppression of the White Slave Traffic*,[142]

(h) The *International Convention against the Taking of Hostages*,[143]

(i) The *Convention on the Physical Protection of Nuclear Material*.[144]

The Conventions mentioned in (a) and (b) above concerning aircraft[145] and war victims[146] have already been discussed.

VII. Crimes against Internationally Protected Persons

The *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents*[147] is intended to protect the person and property of heads of state, ministers of foreign affairs, and officials of intergovernmental organizations and their families who accompany them abroad. The Convention reads in part:

> Article 2
>
> 1. The intentional commission of:
>
> (a) a murder, kidnapping or other attack upon the person or liberty of an internationally protected person;
>
> (b) a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty;
>
> (c) a threat to commit any such attack;
>
> (d) an attempt to commit any such attack; and
>
> (e) an act constituting participation as an accomplice in any such attack
>
> shall be made by each State Party a crime under its internal law.

Article 3

> 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set forth in article 2 in the following cases:
>
> (a) when the crime is committed in the territory of that State or on board a ship or aircraft registered in that State;
>
> (b) when the alleged offender is a national of that State;
>
> (c) when the crime is committed against an internationally protected person as defined in article 1 who enjoys his status as such by virtue of functions which he exercises on behalf of that State.
>
> 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over these crimes in cases where the alleged offender is present in its territory and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.
>
> 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Since subsections 6(1.2) and (4) of the *Criminal Code* fully implement articles 3 and 4 of the *Convention* we see no need for further implementing legislation. However, the substance of those subsections should be separated from section 6 which deals mainly with "Offences Committed on Aircraft" (the title given section 6 in the *Martin's Annual Criminal Code 1983*, p. 16).

VIII. Genocide

Articles II, III and V of the *Convention on the Prevention and Punishment of the Crime of Genocide* of 9 December 1948[148] read:

Article II

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Article III

The following acts shall be punishable:

(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.

Article V

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III.

The *Criminal Code* does not create the offence of genocide or provide for the punishment of such an offence. Indeed, apart from sections 281.1 (Advocating Genocide) and 281.2 (Public Incitement to Hatred), the *Criminal Code* does not mention "genocide." Apparently Canada relies on the other offence sections of the *Code* such as murder and assault to implement Canada's obligations under the *Convention*. This Canadian approach is in sharp contrast to *The Genocide Act 1969* of England which expressly provides for the offence of genocide in subsection 1(1) as follows:

> A person commits an offence of genocide if he commits any act falling within the definition of "genocide" in Article II of the *Genocide Convention*....

Our *Criminal Code* definition of "genocide" (subsection 281.1(2)) — which is only for the purposes of section 281.1 (Advocating Genocide) — does not cover — at least does not *expressly* cover — all the conduct described in the definition of "genocide" in the *Convention*. Section 281.1 reads:

> **281.1** (1) Every one who advocates or promotes genocide is guilty of an indictable offence and is liable to imprisonment for five years.
>
> (2) In this section "genocide" means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely:
>
> (*a*) killing members of the group, or
>
> (*b*) deliberately inflicting on the group

> conditions of life calculated to bring about its physical destruction.
>
> (3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.
>
> (4) In this section "identifiable group" means any section of the public distinguished by colour, race, religion or ethnic origin.

Although we do not propose here to examine in detail whether or not genocide should be made an offence under Canadian criminal law, we note that Canada does not *appear* to have fulfilled a large part of its treaty obligation under Article V of the *Genocide Convention*: "in particular, to provide effective penalties for persons *guilty of genocide or of any of the other acts enumerated in Article III*." [Emphasis added] (Note that it is Article III, not Article II, that is referred to in Article V thereby obligating Canada effectively to punish all the offences included in the *Convention* definition of "genocide" and all the inchoate offences and participatory conduct mentioned in Article III of the *Convention.)*

Jurisdiction to try persons for acts punishable under the *Genocide Convention* is dealt with in Article VI which reads:

> Article VI
>
> Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

It is clear that Article VI does not require a state to prosecute a person for "genocide" that occurs outside its territory. However it should be noted that "the act" referred to in Article VI is "genocide *or* any of the other acts enumerated in Article III." Hence, a conspiracy, incitement or attempt *in Canada to commit genocide* in Canada or *outside Canada* should be an offence under Canadian law. Is it? The answer is not readily apparent. There does not appear to be the "certainty" here that there should be in criminal law — particularly when our treaty obligation calls for a positive and direct implementation by Canada of the above-mentioned provisions of the *Genocide Convention*.

RECOMMENDATION

44. To implement the *Convention on the Prevention and Punishment of the Crime of Genocide* something along the lines of the *British Genocide Act* would

seem to be required in Canada; but any firm recommendation for change will have to await a separate study of the offence of genocide. Suffice it to say at this time that we recommend that such a study be undertaken. Whether it can be fitted into the program of this Commission is not certain at this time.

IX. Dangerous Drugs

The implementation of Canada's obligations under international treaties in this field has been left to statutes other than the *Criminal Code*, namely the *Narcotic Control Act*[149] and the *Food and Drugs Act*.[150]

Under subsection 5(1) of the *Narcotic Control Act* it is an offence for a person without authority to import into Canada or export from Canada any narcotic, as defined in the Act.

By virtue of the definition of the word "traffic" in sections 33 and 40 of the *Food and Drugs Act* it is an offence under section 34 without authority to import into Canada or export from Canada any "controlled drug" as defined in that Act, and under section 42 to import into Canada or export from Canada any "restricted drug" as defined in that Act.

Neither Act creates any extraterritorial offence; whether they, or the *Criminal Code*, should do so in respect of the handling of, or trafficking in, drugs outside Canada is one of the matters that may be looked into in a future study of drug offences to be undertaken by this Commission.

X. Slavery

The Conventions dealing with slavery[151] were implemented for Canada by British legislation. Canada has not repudiated those Conventions; yet the enactment of paragraphs 8(*a*) and (*b*) of the *Criminal Code* in 1953 (whereby offences at common law and offences under English or United Kingdom

legislation cannot be charged under Canadian law) may have repealed the necessary implementing legislation in Canadian criminal law and thereby created a defect.

We have not examined the Conventions. It may be that *Criminal Code* section 195 (particularly paragraphs (*a*), (*d*), (*e*) and (*g*)) adequately implements them but the possible defect should be checked.

RECOMMENDATION

45. We recommend that the possible void in legislation to implement slavery and white slavery international Conventions be examined [by the Ministry of the Solicitor General, the Department of External Affairs and the Department of Justice] with a view to deciding:

(a) whether the defect is real;

(b) whether the likelihood of offences under those Conventions being committed is such as to necessitate further legislation being enacted in Canada to implement the Conventions; and

(c) if there is any such necessity, whether the legislation need provide for offences outside Canada as well as in Canada.

XI. Hostage Taking

Articles 1 and 2 of the *International Convention against the Taking of Hostages* which was signed by Canada on 18 February 1980,[152] requires States-Parties to create certain offences. They read:

> Article 1
>
> 1. Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage taking") within the meaning of this Convention.
>
> 2. Any person who:
>
> (a) attempts to commit an act of hostage taking, or

> (b) participates as an accomplice of anyone who commits or attempts to commit an act of hostage taking
>
> likewise commits an offence for the purposes of this Convention.

Article 2

> Each State-Party shall make the offences set forth in article 1 punishable by appropriate penalties which take into account the grave nature of those offences.

Canada has not yet enacted legislation to implement those articles. However draft provisions to do so appear in *Bill C-19, Criminal Law Reform Act, 1984* which would add a new offence section (247.1) to the *Criminal Code*.

Article 5 of the Convention requires States-Parties to it to confer trial jurisdiction on their courts. It reads:

Article 5

> 1. Each State-Party shall take such measures as may be necessary *to establish its jurisdiction* over any of the offences set forth in article 1 which are committed:
>
> (a) in its territory or on board a ship or aircraft registered in that State;
>
> (b) by any of its nationals or, if that State considers it appropriate, by those stateless persons who have their habitual residence in its territory;
>
> (c) in order to compel that State to do or abstain from doing any act; or
>
> (d) with respect to a hostage who is a national of that State, if that State considers it appropriate.
>
> 2. Each State-Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 1 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States mentioned in paragraph 1 of this article.
>
> 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Subclause 5(3) of *Bill C-19* (*Criminal Law Reform Act, 1984*) would implement Article 5 by adding to section 6 of the *Criminal Code* a subsection (1.3) to read:

> (1.3) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that if committed in Canada would be an offence against section 247.1 shall be deemed to commit that act or omission in Canada if

> (*a*) the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament;
>
> (*b*) the act or omission is committed on an aircraft
>
> (i) registered in Canada under regulations made under the *Aeronautics Act*, or
>
> (ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft in Canada under such regulations;
>
> (*c*) the person who commits the act or omission
>
> (i) is a Canadian citizen, or
>
> (ii) is not a citizen of any state and ordinarily resides in Canada;
>
> (*d*) the act or omission is committed with intent to induce Her Majesty in right of Canada or of a province to commit or cause to be committed any act or omission;
>
> (*e*) a person taken hostage by the act or omission is a Canadian citizen; or
>
> (*f*) the person who commits the act or omission is, after the commission thereof, present in Canada.

The proposed subsection (1.3) would confer trial jurisdiction over alleged hostage taking offenders not only in respect of offences committed outside Canada in ships and aircraft *registered* in Canada (as provided for in the *Convention*), but also in ships *licensed* and so forth in Canada and in certain *leased* aircraft not provided for in the *Convention*. We do not see how such jurisdiction would be justifiable under international law — at least insofar as aliens committing offences outside Canada are concerned. In this connection we should mention that paragraph 3 of Article 5 of the *Convention* surely envisages that the internal criminal law of a state complies with international law. An example of jurisdiction justifiable under paragraph 3 of Article 5 would be the trial by a Canadian court under section 433 of the *Criminal Code* of an alien for hostage taking in the territorial sea of Canada; such justification flows from the right of a state under international law to exercise criminal jurisdiction over offences committed in its territorial sea.

An extension of criminal jurisdiction of Canadian courts beyond that authorized by the *Convention* or rules of international law would not only contravene international law but could possibly also (for the reasons we have mentioned in our discussion about extraterritorial conspiracy offences) contravene section 7 of the *Canadian Charter of Rights and Freedoms*. It may also contravene paragraph 11(*g*) of the *Charter* in cases where the extraterritorial conduct is not an offence as of the time it occurs but only subsequently when the accused comes to Canada.

RECOMMENDATION

46. That the jurisdiction of Canadian courts to try persons accused of hostage taking outside Canada be limited to the bases of jurisdiction prescribed in the (1979) *International Convention against the Taking of Hostages*, or authorized by other principles or rules of international law whether customary or conventional, and that draft subsection 6(1.3) of the *Criminal Code* as proposed in *Bill C-19* (*Criminal Law Reform Act, 1984*) be amended accordingly.

XII. Protection of Nuclear Material

Article 7 of the 1980 *Convention on the Physical Protection of Nuclear Material*, which was signed by Canada on 22 September 1980[153] requires States-Parties to create certain offences. It reads:

> Article 7
>
> 1. The intentional commission of:
>
> (a) an act without lawful authority which constitutes the receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material and which causes or is likely to cause death or serious injury to any person or substantial damage to property;
>
> (b) a theft or robbery of nuclear material;
>
> (c) an embezzlement or fraudulent obtaining of nuclear material;
>
> (d) an act constituting a demand for nuclear material by threat or use of force or by any other form of intimidation;
>
> (e) a threat:
>
> (i) to use nuclear material to cause death or serious injury to any person or substantial property damage, or

> (ii) to commit an offence described in subparagraph (b) in order to compel a natural or legal person, international organization or State to do or to refrain from doing any act;
>
> (f) *an attempt* to commit any offence described in paragraphs (a), (b) or (c); and
>
> (g) an act which constitutes *participation* in any offence described in paragraphs (a) to (f)
>
> shall be made a punishable offence by each State Party under its national law.
>
> 2. Each State Party shall make the offences described in this article punishable by appropriate penalties which take into account their grave nature. [Emphasis added]

Article 8 of the *Convention* requires States-Parties to it to confer trial jurisdiction on their courts. It reads:

> Article 8
>
> 1. Each State Party shall take such measure as may be necessary to establish its jurisdiction over the offences set forth in article 7 in the following cases:
>
> (a) when the offence is committed in the territory of that State or on board a ship or aircraft registered in that State;
>
> (b) when the alleged offender is a national of that State.
>
> 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over these offences in cases where the alleged offender is present in its territory and it does not extradite him pursuant to article 11 to any of the States mentioned in paragraph 1.
>
> 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.
>
> 4. In addition to the States Parties mentioned in paragraphs 1 and 2, each State Party may, consistent with international law, establish its jurisdiction over the offences set forth in article 7 when it is involved in international nuclear transport as the exporting or importing State.

Canada has not as yet enacted legislation specifically to implement Articles 7 and 8. Much of the conduct mentioned in Article 7 is, of course, already punishable as ordinary offences such as theft or fraud under the *Criminal Code*. Provisions to implement Articles 7 and 8 are proposed in subclause 5(3) of *Bill C-19*, *Criminal Law Reform Act, 1984*. But the proposed subsections do not take the two distinct and separate steps called for by Articles 7 and 8 of the *Convention*. That is, they do not create the particular offences as required by Article 7 of the *Convention* and then, separately, prescribe the bases of jurisdiction of Canadian courts required by Article 8 of the *Convention*. Rather, by expressly relating proposed subsections 6(1.4), (1.5) and (1.6) of the *Criminal Code* to proposed subsection 6(1.7) of it, *Bill C-19* joins the creation of the extraterritorial offences mentioned in Article 7 of the *Convention* with the bases of jurisdiction prescribed in Article 8. The result is not only confusing, it could mean that Article 7 would not be fully implemented by

Canada. For example, because paragraph 6(1.7)(*c*) of the draft legislation would form part of the definition of the offences under Canadian law, an Article 7 offence committed by an alien outside Canada, but *not* on board a Canadian ship or Canadian aircraft, would *not* be an offence under the proposed subsections 6(1.4), (1.5) and (1.6) of the *Criminal Code unless* the offender came to Canada *after* committing the offence. In other words, incongruously, unless the offender came to Canada in such a case there would be no offence and there would be no grounds for extraditing the offender to Canada. Such a defect in the definition of offences would repeat the defect that we see in the present subsection 6(1.1) of the *Criminal Code* as discussed in Chapter Five of this Paper. The defect may also violate the right guaranteed by paragraph 11(*g*) of the *Canadian Charter of Rights and Freedoms*.

In any event, the complexity of the structure and wording of the proposed subsections 6(1.4) through (1.7) fails to meet the criterion of clarity to be strived for in our criminal law so that among other things, people will know what conduct is criminal. It should be simplified. We think that that can be done by using words that positively create extraterritorial offences rather than "deeming" them to have been committed in Canada, and by separating the creation of offences or the definition of offences from the conferring of jurisdiction on Canadian courts.

As far as the offences themselves are concerned, we note that subsections 6(1.5) and (1.6) include conspiracies; these are not included in Article 7 of the *Convention*. We feel that the wording in draft subsections 6(1.5) and (1.6) as they apply to conspiracies outside Canada — especially by aliens — may go beyond the bounds of international law unless an overt act in furtherance of the conspiracy takes place in Canada.

RECOMMENDATIONS

47. That draft subsections 6(1.5) and (1.6) of the *Criminal Code* as proposed in *Bill C-19*, the *Criminal Law Reform Act, 1984* not deal with the offence of conspiracy. We would leave that to section 423 of the *Criminal Code* and the General Part extraterritorial provisions that we propose. (As to our suggested amendments to section 423, see Chapter Eleven of this Paper.)

48. More importantly, for the reasons stated above we recommend that the nuclear material physical protection offences be simply defined in the Special Part of the *Criminal Code*, and that the jurisdiction of Canadian courts over them be simply described in the extraterritorial jurisdiction provisions of the General Part.

If the *Criminal Code* were to be amended as we proposed earlier so that Canadian courts would have criminal jurisdiction over all offences outside Canada committed in ships registered in Canada or aircraft registered in

Canada, there would be no need for the *Code* to specifically mention nuclear offences committed in them as proposed in *Bill C-19* for paragraphs 6(1.7)(*a*) and (*b*) of the *Criminal Code*.

Another aspect of the proposed subsection 6(1.4) that causes concern is that, in contrast to the drafting technique employed in subsections (1.3) and (1.6), no mention is made in subsection (1.4) of the section numbers of the offence-creating provisions of the *Criminal Code* that are, by virtue of subsection (1.4), made applicable *outside* Canada. The failure of subsection (1.4) expressly to incorporate by reference particular offences, raises a doubt, or at least a question, as to exactly what extraterritorial offences are included in subsection (1.4). This is particularly so because there are no offences "against this Act" (the *Criminal Code*) that are (other than in subsection (1.4)) described in terms of nuclear material involvement. Would the expressions "offensive weapon," "weapon" or "explosive substance" as now defined in the *Criminal Code* or in *Bill C-19* be relevant? Does subsection (1.4) incorporate offence sections 203 (death by criminal negligence), 204 (bodily harm by criminal negligence), 212 (murder), 387(2) (mischief — danger to life), 387(3) (mischief — danger to property), 388 (destroying or damaging property)? Presumably subsection (1.4) was intended to do so. However, might it not be argued by an accused that subsection (1.4) does not *create* any offences because the gravamen of the offences under the United Nations *Convention*, which subsection (1.4) is designed to implement, is the handling or using of nuclear material in a way which causes, or is likely to cause, death or serious injury or property damage? Hence (the argument might run), until Parliament creates express nuclear material offences in the *Criminal Code* (somewhat like the explosive substance offences in sections 77, 78, 79 and 80), there are no *nuclear material offences "against this Act"* that can be deemed to have been committed in Canada pursuant to subsection (1.4).

In view of the foregoing, it may be advisable to amend the wording of proposed paragraphs (*a*) and (*b*) of subsection (1.4) to refer expressly to numbered sections of the *Criminal Code* and perhaps also to offences involving the misuse of nuclear material under other statutes such as the *Atomic Energy Control Act*.[154] In any event, subsection 6(1.4) of the *Criminal Code* as proposed in *Bill C-19* does not appear to define the offences (that it purports to create) with the certainty desired in criminal law.

Another reason for changing the above-mentioned proposed subsections of section 6 of the *Criminal Code* would be that they appear to be inconsistent with subsection 6(3) as proposed in subclause 5(4) of the *Bill*. The proposed subsection 6(3) of the *Code* reads:

> (3) Where a person is alleged to have committed an act or omission *that is an offence by virtue of this section*, proceedings in respect of that offence may, *whether*

> *or not that person is in Canada*, be *commenced* in any territorial division in Canada and the accused may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division. [Emphasis changed]

The words "whether or not that person is in Canada" are confusing; they appear to be inconsistent with paragraphs 6(1.3)(*f*) and (1.7)(*c*) in cases where the accused would have to be present *in* Canada, after having committed the act or omission outside Canada, in order for it to be deemed to have been committed inside Canada and therefore to amount to an offence "by virtue of this section [6]." On the other hand, it may be that the words "that is an offence by virtue of this section" that appear in the proposed subsection 6(3) mean that if the accused *had* been present in Canada at any time after the act or omission occurred outside Canada, subsection 6(3) would permit proceedings to commence during a *later* absence of the accused from Canada.

In any event, it would seem, from reading the proposed subsection 6(3.1), that the intent of subsection 6(3) would be only to permit proceedings *to commence* in Canada when an accused is outside Canada (thereby to facilitate extradition proceedings), but *not* to permit the *actual trial* and punishment of the accused in Canada in the absence of his appearance at trial — unless otherwise prescribed in the *Criminal Code*, for example, section 577. If that is the intent of subsections 6(3) and (3.1), it should be made clear in the subsection.

PART THREE:

OFFENCES COMMITTED PARTLY IN CANADA AND PARTLY OUTSIDE CANADA — TRANSNATIONAL OFFENCES

CHAPTER NINE

Criminality of a Person's Acts under Canadian Law

Normally we speak of an offence being *committed* in a particular state. However, where one or more constituent elements of an offence occur in one state, and one or more of them occur in another state, there is no state to which one can point as *the* state in which the offence was *committed*; such an offence is often referred to as a "cross-border offence" or, as we shall call it, a "transnational offence." A classical example of a transnational offence would be "A" in Ontario firing a gun across the United States - Canada border, killing "B" in New York. The constituent elements are things that the statute says the offender must do, or that the statute says must occur or result, in order for the offence to have been committed by the accused; in other words, the facts as to the accused's conduct and (depending on the offence) the mental state of the accused and the result of the accused's conduct that the prosecutor must prove if there is to be a conviction. In this connection let us analyse the facts in the following case. An American citizen residing in New York City telephones police in Montréal and, with intent to mislead, makes a false statement accusing some other person of having committed an offence; the false statement causes a peace officer in Montréal to enter on an investigation; the American citizen subsequently comes to Canada and he is charged with an offence under paragraph 128(*a*) (Public Mischief) of the *Criminal Code* which reads:

> **128.** Every one who, with intent to mislead, causes a peace officer to enter upon an investigation by
>
> (*a*) making a false statement that accuses some other person of having committed an offence,
>
> ...
>
> is guilty of

> (*e*) an indictable offence and is liable to imprisonment for five years, or
>
> (*f*) an offence punishable on summary conviction.

What are the constituent elements of the offence? Where did they occur? The answers to these questions seem to be:

Constituent Element	Place where constituent element occurred
1. Making a false statement	Statement was made in New York
2. Intent to mislead	Intention was formed in New York
3. Caused a peace officer to investigate	Investigation in Montréal

However there remain two essential questions for our purposes, namely: Would a prosecution of the American citizen in Canada for an offence under paragraph 128(*a*) of the *Criminal Code* be justifiable under international law? Under Canadian law? Let us look first at international law.

Where an offence is wholly committed in the territory of one state, and the direct, harmful results occur there only, the territorial principle of international law clearly recognizes the applicability of the criminal law of that state and the trial jurisdiction of the courts of that state in respect of the offence.

The international law relating to transnational offences is not as clear. However, it would appear that where constituent elements of an offence occur in different states, the *subjective* territorial principle of international law recognizes that the criminal law of each of those states in which a substantial constituent element occurred may concurrently be applicable, and that the courts of those states may have concurrent trial jurisdiction over the offence. Where no substantial constituent element of the offence occurs in the territory of a given state, but substantial, direct harmful effects of the offence are felt in the territory of that state, the *objective* territorial principle of international law recognizes that that state may apply its criminal law, and that its courts may exercise trial jurisdiction over the offence.[155]

To what extent has Canada implemented these principles of international law? How does a person know whether Canadian criminal law, particularly the *Criminal Code*, is applicable to a transnational offence? What does the *Criminal Code* say about this? The answers are that it is difficult to ascertain whether or not Canadian criminal law is applicable, and that, apart from bigamy offences, the *Criminal Code* is silent on the matter.

Subsection 5(2) of the *Criminal Code* reads:

> Subject to this Act or any other Act of the Parliament of Canada, no person shall be convicted in Canada for an offence committed outside of Canada.

It should be noted that nothing is said in subsection 5(2) about offences committed "partly" outside Canada; and unfortunately, the *Criminal Code* is also silent as to what constitutes "committing" an offence *in* Canada. And so the question arises: Need all elements of an offence occur in Canada to constitute *under Canadian law* the commission of the offence here?

In an 1895 Canadian case (*R.* v. *Blythe*,[156] B.C. Court of Appeal), a person who used Canadian mails to entice an unmarried female under sixteen was held not to have committed an offence in Canada. The accused had written letters in Victoria, British Columbia to the girl in Washington State urging her to join him; she left her father in Washington to join the accused in Victoria. It was held, that as the persuasion to leave and remain away operated wholly in the United States, there was no jurisdiction to convict in Canada. Mr. Justice Walkem went so far as to say that:

> [E]very act which serves in whole *or in part* to constitute an offence under our criminal law must occur or be committed within the territorial limits over which that law extends, or in other words, within the Dominion; otherwise we have no authority to adjudicate upon it. [Emphasis added]

In the 1965 case of *R.* v. *Selkirk*[157] the Court of Appeal of Ontario ruled that the accused did not commit *in Canada* an offence under subsection 323(1) of the *Criminal Code* when he mailed a fraudulent application in Toronto to the Diner's Club in Los Angeles, in response to which a Diner's Club credit card was mailed in Los Angeles to the accused in Toronto. The court said:

> [W]hen the Club placed the card ... in the post office in Los Angeles, delivery of the card had been made to the accused. The whole of the offence, therefore took place in the United States.

However, in a somewhat similar case, (*Re Chapman*) the Ontario Court of Appeal later (1970) ruled that an offence under subsection 323(1) of the *Criminal Code* was committed in Canada when the accused mailed fraudulent letters in Canada to persons in the United States in response to which money was sent by mail from those persons in the United States to the accused in Canada.[158]

English case-law on the subject has also been somewhat inconsistent at times, and legal scholars have different views as to what the law is, and also as to what the law should be. Thus, Lynden Hall, in 1972 wrote:

> In solving the problem of the locus of the crime two views are prevalent: first, that the offence is committed within the country in which it is commenced; secondly, that it is committed in the country where it is consummated. These are commonly called the "subjective" and "objective" territorial theories of jurisdiction respectively, though Glanville Williams prefers the terms "initiatory" and "terminatory."[159] Clearly the English Law Commission has been influenced by Professor Williams' views. Both are of the opinion that English law has adopted the "terminatory" theory, apparently to the exclusion of the "initiatory" theory. Both make the assertion that the courts determine the locus of the offence by deciding where the "last constituent element" of the crime occurs. The constituent elements of an offence may be said to consist of those acts or omissions together with any consequences or effect of conduct which are included in the definition of the offence. Both Professor Williams and the Law Commission consider the "terminatory" theory unsatisfactory. Professor Williams advocates the "initiatory" theory, while the Law Commission suggests: "It should be *enacted* that where any act or omission or any event constituting an element of an offence occurs in England or Wales, that offence shall be deemed to have been committed in England or Wales even if other elements of the offence take place outside England or Wales."[160] Such a proposal has far-reaching implications. Suppose "A" is travelling to China by train. While in Paris "B" puts arsenic in "A"'s brandy flask. "A" drinks the brandy in Bulgaria as a result of which he dies in Tashkent (Russia). Suppose also the Law Commission's proposal to be universally adopted. The "initiatory" and "terminatory" theories would establish the jurisdiction of France and Russia respectively as the countries in which the crime was begun and consummated. Legislation of the Law Commission type would admit these jurisdictions, but would also deem the crime committed in Bulgaria and, it seems, every country through which "A" travels before dying.

Professor Hall does not go along with Professor Williams' view that the initiatory theory should prevail, or with the English Law Commission's 1972 view (withdrawn in 1978)[161] that the "any element deeming committed" theory should be enacted into law. Rather, he is favourably impressed by what he considers to be a novel approach taken in 1971 by Lord Diplock in *Treacy* v. *D.P.P.*[162] According to Professor Hall:

> From the negative statement (that) an English court may not exercise jurisdiction unless the crime was committed, or may be deemed committed, in England, Lord Diplock has shifted the emphasis to the positive averment (that) an English court may exercise jurisdiction where an element of the offence occurs in England unless Parliament has enacted otherwise.

Professor Hall approves of Lord Diplock's reasoning, but adds that "some restraint (on Lord Diplock's approach) would seem to be required." Hall goes on to say that:

> An English court should be able to assume jurisdiction ... where *a single element* of the offence has occurred in England *provided that it establishes a real and substantial link between the offence and England*. Such a test is not unfamiliar to international lawyers in the sphere of diplomatic protection and the exhaustion of local remedies. It is not unknown in private international law. In fact, in no English case has the Court assumed jurisdiction where the link between the offence and England has been tenuous .... [Emphasis added]

Although it tends to go somewhat against the grain of certainty that we wish to see in criminal law, we are inclined to agree with Professor Hall's modified Lord Diplock approach. However, given the provisions of subsections 5(2) and 7(1) of the *Criminal Code*, it is far from certain that offence sections of the *Criminal Code* — at least insofar as their applicability to transnational situations is concerned — would be construed by courts in Canada to provide the same result as Lord Diplock arrived at under English law. Hence, legislation to amend the *Criminal Code* will probably be required in Canada to achieve that result. In any event, legislation could provide certainty in the law.

In this connection, it is necessary to recognize the difference between *result* crimes and *conduct* crimes. If a result crime, such as an offence against subsection 387(2) of the *Criminal Code*, occurs in the United States, that is if all constituent elements except the danger to life occur in the United States, and the proscribed *result* — namely, the actual danger to life, occurs in Canada, that is not an offence that has been committed wholly outside Canada because an important constituent element of the offence, namely the result, has occurred in Canada. Canadian courts could therefore exercise criminal jurisdiction based on the subjective territorial principle.

On the other hand, if a *conduct* crime, such as an offence against subsection 341(1) of the *Criminal Code*, occurs in the United States, and all constituent elements of it occur in the United States, a harmful result affecting stock exchanges in Canada would provide a basis under international law for Canadian courts to exercise criminal jurisdiction on the objective territorial principle. Similarly an offence under paragraph 361(*c*) of the *Criminal Code* committed outside Canada that caused "disadvantage" to an intended person in Canada, could, as far as international law is concerned, be tried in Canada under the objective territorial principle. Such offences, although wholly committed in the United States, nonetheless have direct and substantial harmful effects in Canada. Hence Parliament could amend the *Criminal Code* to authorize Canadian courts to exercise such criminal jurisdiction based on the objective territorial principle, even though no constituent element of the offence occurs in Canada.

We believe that there is room in, and reason for, Canadian law to utilize both the constituent element doctrine and the effects doctrine, or to put it another way, to implement both the subjective territorial principle and the objective territorial principle in Canadian criminal law. An offence would then be triable in Canada if it were committed in whole or in part in Canada, or wholly outside Canada where the offender knowingly caused direct and substantial harmful effects to occur in Canada.

RECOMMENDATION

49. That the General Part of the *Criminal Code* provide:

(a) that an offence is committed in Canada when it is committed in whole or in part in Canada; and

(b) that it is committed "in part in Canada" when

  (i) some of its constituent elements occurred outside Canada and at least one of them occurred in Canada, and a constituent element that occurred in Canada established a real and substantial link between the offence and Canada, or

  (ii) all of its constituent elements occurred outside Canada, but direct substantial harmful effects were intentionally or knowingly caused in Canada.

Our basic concern is that, subject to our comments that follow concerning the juridical nature of the conduct under the law of the other country concerned, no person should escape the application of *the criminal law* (for acts punishable in Canada) simply because part of the conduct in question occurred outside Canada or because, in a case where direct harmful effects were felt in Canada, all the conduct of the offender occurred outside Canada. A further example of what we have in mind is *a threat made outside Canada* to do violence to a person in Canada in the circumstances mentioned in paragraph 381(1)(*a*) or (*b*) of the *Criminal Code*. At the present time it is doubtful that such a threat made outside Canada to a person in Canada would constitute an offence under either of those paragraphs. We also have in mind the fact that various fraudulent schemes of international dimensions are facilitated by modern technology such as computers[163] and space satellite means of communication.

That the "any constituent element" approach should be adopted to deal with transnational criminal situations is supported by the fact that it has, with variations, been recommended by other law reform groups. In particular, it has been recommended in the American Law Institute's *Model Penal Code*,[164] supported to some extent by the English Law Commission,[165] included in draft Congressional Bills in the United States[166] and legislatively adopted in New Zealand. The most straightforward approach is that enacted in the New Zealand legislation which reads:

> For the purpose of jurisdiction, where any act or omission forming part of any offence or any event necessary to the completion of the offence, occurs in New Zealand, the offence *shall be deemed to be committed in New Zealand* whether the person charged with the offence was in New Zealand or not at the time of the act, omission or event.[167] [Emphasis added]

CHAPTER TEN

Criminality of a Person's Acts under the Applicable Foreign Law

The New Zealand legislation mentioned in the last chapter, besides employing the "deeming" device that we would prefer to avoid, may lead to unfairness in certain situations because it does not take into account the law of the country in which the act occurred outside New Zealand. What if an act is performed in Canada, the result of which is designed or is likely *only* to be felt in another state that does not prohibit the act? That state may even encourage or require such acts. The *Model Penal Code* excepts such situation from prosecution under it,[168] but the English Law Commission, which otherwise generally adopted the same approach as the *Model Penal Code*, passed over this situation in silence.[169]

In essence the question at hand is whether a prosecution in Canada of a transnational offence should be conditional on the conduct abroad or harmful effects felt abroad being a crime under the laws of both Canada and the other country concerned. (There is the further question whether, and under what circumstances, the pleas of *autrefois acquit* and *autrefois convict* should be available to the accused before a court in Canada on a charge of a transnational offence for which he has been acquitted or convicted in another country. However, since the second question relates equally to offences committed completely outside Canada, we propose to deal with it in Chapter Fifteen under the separate heading entitled "Double Jeopardy." We will examine the question at hand under the following headings:

I. Acts in Canada with sole effects outside Canada;

II. Acts outside Canada with effects in Canada; and

III. Criminality of a person's omissions.

I. Acts in Canada with Sole Effects outside Canada

We prefer the *Model Penal Code*'s approach. We think that an act in Canada that has no harmful effects in Canada should not be punishable in Canada if the result of that act was designed, or was likely to occur, only in another state which does not prohibit that act or result and may even encourage them. This would avoid Canada's purporting to prohibit action in other countries which is permissible there, and would accord with our view that criminal law should concern itself with the prevention by a society of harm to *that* society. If the action is permissible in a foreign country, presumably there is no harm (at least no criminal harm) in the eyes of the society of that country.

But the question is by no means without difficulty. This Commission has accepted that the primary purpose of criminal law is to underline basic social values, and some people might argue that those values are equally affected whether the results (of an act in Canada) occur outside Canada or in Canada; it may seem strange to the layman that an act in Canada, that is intended to achieve certain results thought blameworthy, indeed criminal, in the eyes of Canadian law, should be excusable merely because those results are felt outside Canada only. Others may argue that, in justice, Canadian law should at least excuse a non-Canadian citizen or a person not ordinarily resident in Canada from being prosecuted in Canada for an act in Canada whose consequences were felt only in a state where the consequences were not unlawful. We are inclined to the view that citizenship or nationality would not be a justifiable criterion on moral or legal grounds for differentiating between prosecuting, or not prosecuting, a person in Canada for an act committed in Canada that had harmful results only in a state whose law did not make the act or its harmful results an offence.

RECOMMENDATION

50. That the General Part of the *Criminal Code* provide that where a criminal act occurs *in* Canada, the harmful consequences of which are designed to occur or are likely to occur or do, in fact, occur *only* in another state or states which does/do not prohibit the act by its/their criminal law, the act *in* Canada that causes such consequences, even though it constituted a criminal offence in Canada, shall not, under our law, be subject to prosecution in Canada.

ALTERNATIVE RECOMMENDATION

50. Alternatively we would recommend that where a criminal act occurs *in* Canada, the harmful effects of which are designed to occur or are likely to occur or do in fact occur in another state and no substantial harmful effects are felt in Canada, the offence *may be prosecuted in Canada but* that an accused shall *not be*

convicted **of that offence** ***if*** **he proves that his conduct did not amount to an offence under the criminal law of the state in which the harmful effects were designed to occur, or were likely to occur, or did in fact occur.**

If our Recommendation 50 were adopted, the foreign law could prevent a prosecution in Canada; in other words it would go to jurisdiction; whereas if our alternative Recommendation 50 were adopted, the accused could be prosecuted but he could plead foreign law as a matter of defence. While we recognize the important procedural and practical differences between the two recommendations, we are not at this time prepared to prefer one over the other.

II. Acts outside Canada with Effects in Canada

What of an act performed *outside* Canada, in a state whose law does not prohibit it, which leads to a result in Canada that is prohibited by criminal law in Canada, for example, an attempted extortion under subsection 305(1) of the *Criminal Code* by sending threats from a foreign state to a person in Canada? The constituent elements of the offence are completed outside Canada. It may be that the state concerned may not have criminalized "attempts." The *Model Penal Code* and the English Law Commission would exclude such acts from criminal prosecution in Canada unless the producing of the result in Canada was done *intentionally*. We agree with this. We feel that in these situations it is not unreasonable to adopt the attitude that a person should have inquired as to what the law in Canada was before acting with such purpose or intention, and therefore that it is not unreasonable to deem that the offender knew it to be a crime to cause the intended results in Canada. In other words, even though this is a transnational situation, once it is proved that the offender knew that he would cause direct, substantial harm in Canada, it is not unreasonable to presume that he knew the criminal law of Canada so that ignorance of the law would be no excuse.

RECOMMENDATION

51. That the General Part of the ***Criminal Code*** **provide that no person shall be [convicted by a Canadian court of][prosecuted in a Canadian court for] an offence for having performed an act in a state other than Canada that was** ***not*** **an offence under the law of that other state, and whose harmful consequences are felt or occur in Canada, unless that person intentionally or knowingly caused the harmful consequences to occur or to be felt in Canada.**

III. Criminality of a Person's Omissions

So far in this discussion on transnational offences we have referred only to *acts* of persons. But what of *omissions*?

We are, of course, speaking only of omissions or failures that constitute offences under Canadian law such as offences under many sections of the *Criminal Code* including sections: 50 (omitting to prevent treason), 197(2) (failure to provide necessaries to spouse, etc.), 202 (criminal negligence by omission), 207 (death which may have been prevented), 285 (theft by a bailee), 355 (omitting a book entry with intent to defraud). Omitting to take the required action in one country could cause the proscribed result to occur in another country. Although it may be reasonable to fix a person with responsibility for certain results in Canada of his acts outside Canada, a question arises as to how far the law should go in fixing a person outside Canada with responsibility for results in Canada of his *non-action*; that is, his omissions outside Canada? And what of omissions *in* Canada that have consequences outside Canada? The English Law Commission made no distinction between acts and omissions in this connection. We are inclined to agree.

RECOMMENDATION

52. That the *Criminal Code* General Part provide for "omissions" in Canada and outside Canada in the same way as we have recommended in respect of "acts" in Recommendations 50 and 51.

PART FOUR:

INCHOATE OFFENCES

CHAPTER ELEVEN

Extraterritorial Inchoate Offences

I. General Comments

Inchoate offences such as conspiring or attempting to commit a substantive offence may be completely committed in one country although the intended substantive offence was to have been committed in another country. For example, if two people conspired in Toronto to commit theft in New York, the offence of *conspiracy* would have been wholly committed in Canada, and jurisdiction of Canadian courts would be based on the territorial principle. If they had conspired in New York to commit theft in Toronto, the offence of *conspiracy* would have been wholly committed in New York and jurisdiction of Canadian courts could not be based on the territorial principle. Similarly, if a person tried to murder someone in Canada by attempting, but failing, to fire a rifle in New York State pointing at the intended victim across the border in Ontario, it would represent the inchoate offence of "attempt" wholly committed outside Canada. These, then, are not examples of cross-border or transnational offences. However, some inchoate offences could be committed in such a way that they are both inchoate and transnational. For example: "A" in New York City and "B" in Ottawa conspire in a telephone conversation to commit an offence (in any country).

II. Conspiracies

Subsection 423(2) of the *Criminal Code* generally defines conspiracy as conspiring with anyone to effect an unlawful purpose, or to effect a lawful purpose by unlawful means. In addition, subsection 423(1) makes provision for conspiracies to commit murder, knowingly to prosecute an innocent person for an alleged offence punishable by imprisonment, and conspiracies to commit any indictable offence.

A. Conspiracy in Canada to Do Something outside Canada

Until the amendments to section 423 of the *Criminal Code* in 1975, it had never been completely settled whether a conspiracy *in Canada* to commit a crime abroad constituted an offence here.[170] The probability was that apart from any explicit statutory exception, it did not. That probability is supported by strong English authority[171] and the fact that it was previously felt necessary to provide explicitly in paragraph 423(1)(*a*) of the *Criminal Code* that conspiring in Canada to murder someone abroad was a crime in Canada. However that may be, subsection 423(3) was added in 1975, making it clear that a conspiracy in Canada to commit any offence abroad could constitute an offence of conspiracy in Canada. That subsection reads as follows:

> (3) Every one who, while in Canada, conspires with anyone to do anything referred to in subsection (1) or (2) in a place outside Canada that is an offence under the laws of that place shall be deemed to have conspired to do in Canada that thing.

In examining this provision several questions come to mind. (a) In principle, should conspiring in Canada to do something outside Canada (which is unlawful in Canada) constitute an offence under Canadian criminal law? (b) If so, under what conditions? In particular: (i) need the doing of that something in the foreign state be unlawful according to the law of that state, and (ii) need it be not only unlawful but criminal? That is, need it constitute an "offence" under the foreign law?

As to question (b) and its sub-questions, we are here really asking the more difficult questions: How should the net be cast, and how widely? One could argue that a conspiracy to do something abroad, which would be punishable under Canadian law if done in Canada, should be subject to prosecution in Canada whether or not it would be unlawful in a foreign country. However, we think the approach now taken in subsection 423(3) of the *Criminal Code* is generally right, namely, that the thing conspired to be done abroad must not simply be unlawful in Canada, but must be *an offence* in the country where it is intended to take place.

In feeling that the test of the foreign law should be "offence" rather than simply "unlawful" we are concerned that the definition of the offence of conspiracy under subsection 423(2) of the *Criminal Code* includes conspiring to effect any *unlawful purpose or* conspiring to effect any *lawful purpose by unlawful means*. These unlawful purposes or means need not be criminal in themselves. We will not comment here on the reasonableness or otherwise of that aspect of conspiracy law in the context of conspiring *in Canada* to do something *in Canada*; however, although it is not unreasonable to expect someone who in Canada, plans with others to effect some purpose *in a foreign country*, to be aware of the relevant criminal laws of that country, it may be unreasonable to expect him to know its voluminous multi-level non-criminal law and to hold him *criminally responsible* in Canada *for* having agreed in Canada to do something in a foreign country that is merely a *contravention of a non-criminal law* (for example, municipal by-law) in that country. That is substantially the approach of the *Model Penal Code*.[172] We therefore are of the view that the crime of a conspiracy in Canada to do something abroad is properly limited to conspiracies to do things which constitute "offences" where they are intended to take place.

In England, there has been support for what may be called a *malum in se* approach: that conspiracies in England to do something in another state which would be a serious crime under English law, should be punishable as a conspiracy in England whether or not the thing to be done is prohibited by the law of the other state.[173] We agree with that approach. However, it would be inconsistent with the basis of our *Criminal Code* to leave to the courts the decision as to whether a crime is *malum in se*. Since our law rightly emphasizes that crimes should be clearly defined by statute, Parliament should prescribe what conspiracies in Canada (to commit certain crimes abroad) are criminal and merit punishment regardless of where the result is intended to occur and regardless whether the thing to be done is an offence or even unlawful according to the law of any state other than Canada, for example, treason. Indeed, paragraph 423(1)(*a*) of the *Criminal Code* already so provides in respect of the offence of conspiracy to murder. The reasons for such extensions may vary. It may be because it is thought that persons who plan in Canada to engage in that type of criminal conduct outside Canada evince a threat that they will engage in similar conduct in Canada. Or it may be that planning such a thing is so offensive to the values of the Canadian community that such planning should be made criminal whether the conduct is considered by another state to be offensive or not.

RECOMMENDATION

53. That the existing approach in subsection 423(3) of the *Criminal Code* be maintained, but that in addition, consideration be given by the federal

Department of Justice as to whether there are any specific offences so serious that Parliament should enact that a conspiracy in Canada to commit them outside Canada would constitute a crime in Canada regardless how they may be regarded by the law of any other state.

B. Conspiracy outside Canada to Do Something in Canada

Until 1975, it was doubtful, to say the least, that a conspiracy outside Canada to commit a crime in Canada would itself have constituted a crime in Canada. However, subsection 423(4) of the *Criminal Code* (enacted in 1975) provides that anyone outside Canada who conspires with anyone (apparently anywhere), to do in Canada anything mentioned in subsection 423(1) or (2) shall be deemed to have conspired in Canada to do that thing. In principle we agree with this approach. As Lord Salmon stated in 1973 in *D.P.P.* v. *Doot*:[174] "If a conspiracy is entered into abroad to commit a crime in England, exactly the same public mischief is produced by it as if it had been entered into here [in England]."

However, we feel that subsection 423(4) is too sweeping insofar as it refers to subsection 423(2). Under section 423(2), a conspiracy is an offence so long as its object is "unlawful" or, though lawful, is done by "unlawful means." Thus 423(4) imposes an undue burden on people outside Canada — particularly people doing occasional business in Canada — to check and intend to comply with not only the relevant criminal law of Canada but also *all* relevant federal, provincial and municipal *civil* laws, to avoid *criminal* liability.

If the *Criminal Code* were to be amended to withdraw the jurisdiction of Canadian courts to try conspiracies under subsection 423(2) committed outside Canada, it would be consistent with the original intent of subsection 423(4) as explained to the Senate of Canada, Legal and Constitutional Affairs Committee when it was dealing with the Second Proceedings on *Bill C-71* on 25th February, 1976.[175] At that time the Committee was advised that "[u]nder this provision [423(3)] it would have to be an *offence* both in Canada and abroad, when the conspiracy is in Canada. The other way around, when the conspiracy is outside of Canada [423(4)], it need only be an *offence* in Canada." [Emphasis added] Contrary to that statement, neither subsection 423(3) nor (4) requires that the conspiracy need to be a conspiracy to commit an *offence* in Canada; rather that suffices if the conspiracy is to effect an unlawful purpose (criminal or non-criminal) or to effect a lawful purpose by unlawful means (criminal or non-criminal).

> We feel that the only conspiracies outside Canada that should be prosecuted in Canada are those that have as their objective the commission of an [indictable] offence in Canada.

Another concern that we have with subsection 423(4) is that it applies to *anyone* outside Canada. The applicability of that subsection to aliens outside Canada raises the question whether that subsection is inconsistent with applicable principles of international law, and if so, whether such inconsistency with international law would amount to a deprivation of liberty and security of a person, which is not in accordance with the principles of fundamental justice, and therefore contrary to section 7 of the *Canadian Charter of Rights and Freedoms*.

The pre-*Charter* court decisions that courts cannot strike down Parliamentary enactments that by their wording clearly violate international law,[176] might well remain valid. However, given the reference in paragraph 11(*g*) of the *Charter* to international criminal law, and the reference in section 7 of the *Charter* to principles of fundamental justice, and the post-*Charter* general power of the courts to examine legislation for validity under the *Charter* — in addition to examining it from the point of view of division of legislative powers between the federal Parliament and the provincial Legislatures — it may be, at least as far as an individual's rights under criminal law are concerned, that the courts could strike down subsection 423(4) or at least restrictively construe it to apply only in accordance with the principles of international law.[177]

Insofar as Canadian citizens outside Canada are concerned, it would appear that the applicability of subsection 423(4) to them would be justifiable under the nationality principle of international law. But aliens, at least those who owe no allegiance to Canada, are not caught by the nationality principle of international law. The territorial principle is, of course, not applicable and, except in certain cases, neither the universality principle nor the objective personality principle would be applicable. That leaves the protective principle. However, while international law recognizes the right of a state to protect its security by subjecting aliens abroad to its criminal law in respect of offences against that security, it is not clear that that principle of international law is applicable to preliminary conduct such as a conspiracy that has not even reached the stage of an attempt to commit an offence which, if completed, would be an offence against the security of a state. Furthermore, there may be difficulty in getting an alien to come to Canada (voluntarily or involuntarily) to be tried for a conspiracy abroad; the difficulty would arise not only because extradition usually applies only to offences committed within the territorial jurisdiction of the state requesting extradition, but also because the crime of conspiracy, as such, is generally unknown to civil law systems and is not an extraditable offence under many Canadian extradition treaties.

In view of the foregoing we feel that section 423 should be amended to ensure that it is consistent with principles of international law. That could be done by limiting its applicability to only certain offences as far as aliens are concerned. But it would be extremely difficult to provide accurately and clearly the extent to which Canadian criminal law could validly, under international law, apply to conspiracies committed outside Canada by aliens. In our view, the better way to remedy the defects of subsection 423(4) would be to have the whole of subsection 423(1) apply outside Canada to Canadian citizens and aliens alike, and to provide also (in the *Criminal Code* — General Part) that a person could not be prosecuted in Canada (for conspiring outside Canada to commit an offence in Canada) unless some overt act toward the commission of the substantive offence was performed in Canada. An exception (to the requirement for an overt act) could be made in respect of conspiracies to commit particularly harmful offences that the international community recognizes as particularly harmful to mankind such as unlawful importation of drugs, excessive environmental pollution, or food contamination. In respect of extraterritorial conspiracies to import narcotics illegally into the United States of America, it has been rather convincingly argued that while no *one* principle of international law would justify the applicability of national law and jurisdiction over the extraterritorial conspiracy, a combination of the three principles of universality, protection and objective territoriality could do so.[178]

In other cases, an overt act in Canada in furtherance of a conspiracy outside Canada could justify Canadian courts being given jurisdiction under the subjective territorial principle of international law. The English Law Commission found that such a requirement for an overt act in England was part of the law of conspiracy in England, and they recommended that it be retained.[179] Recent Bills before the Senate and House of Representatives in the United States proposed the codification of the "overt act" rule for conspiracies outside the United States to commit offences in the United States.[180] Apparently those institutions agreed that an overt act in the forum state was necessary to justify its jurisdiction under the territorial principle of international law, and, perhaps, to satisfy the principle of "reasonableness."

RECOMMENDATION

54. That the *Criminal Code* provide that the only conspiracies outside Canada that may be prosecuted in Canada be those that satisfy both the following conditions, namely conspiracies:

(a) that have as their object the commission of an indictable offence in Canada, and

(b) pursuant to which or in furtherance of which an overt act takes place in Canada, unless the conspiracy had as its object the commission of an offence in Canada that Parliament specifies as an exception to the overt act requirement such as the unlawful importation of drugs into Canada.

To attain that result we recommend that subsections 423(4), (5) and (6) of the *Criminal Code* be deleted, and that the General Part confer jurisdiction on Canadian courts to try any offence against subsection 423(1) of conspiracy, committed outside Canada, if an overt act in furtherance of the conspiracy has been performed in Canada, provided that an overt act not be required in respect of particular offences to be specified by Parliament.

C. Explanatory Note

The above amendments to section 423 and the General Part would change the present law in two ways.

> First, no longer would Canadian courts have jurisdiction to try a person for an offence against subsection 423(2) of conspiracy *outside* Canada to do something that was unlawful but non-criminal; rather, their jurisdiction over conspiracies outside Canada would be limited to those which have as their object the commission of an indictable (serious) offence as mentioned in subsection 423(1).
>
> Secondly, an overt act in Canada would be required as a condition precedent to Canadian courts having jurisdiction to try conspiracy offences committed outside Canada unless the conspiracy was to commit one of a number of specified offences in Canada such as unlawful importation of drugs.

III. Attempts

Sections 24 and 421 of the *Criminal Code* read:

> **24.** (1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.
>
> (2) The question whether an act or omission by a person who has an intent to commit an offence is or is not mere

> preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.
>
> **421.** Except where otherwise expressly provided by law, the following provisions apply in respect of persons who attempt to commit or are accessories after the fact to the commission of offences, namely,
>
> > (*a*) every one who attempts to commit or is an accessory after the fact to the commission of an indictable offence for which, upon conviction, an accused is liable to be sentenced to death or to imprisonment for life, is guilty of an indictable offence and is liable to imprisonment for fourteen years;
> >
> > (*b*) every one who attempts to commit or is an accessory after the fact to the commission of an indictable offence for which, upon conviction, an accused is liable to imprisonment for fourteen years or less, is guilty of an indictable offence and is liable to imprisonment for a term that is one-half of the longest term to which a person who is guilty of that offence is liable; and
> >
> > (*c*) every one who attempts to commit or is an accessory after the fact to the commission of an offence punishable on summary conviction is guilty of an offence punishable on summary conviction.

An attempt in Canada to commit an offence outside Canada probably does not constitute the inchoate offence of "attempt" under existing Canadian criminal law. The few *extraterritorial* offences proscribed by the *Criminal Code* or other federal statutes would be exceptions, for example, treason, subsection 46(3). And, if our recommendation regarding transnational offences were adopted, a completion of an offence outside Canada after an attempt in Canada would likely constitute a substantive offence under Canadian criminal law. But is that enough?

If we accept the view that a conspiracy in Canada to commit an offence outside Canada should constitute a crime in Canada, it follows *a fortiori* that this should be true of attempts as well. An attempt can itself constitute a danger where it takes place even if its intended object is abroad; for example, an attempt by a person in Ontario to murder someone in the state of New York by shooting across the United States — Canada border. Such an attempt would be a crime under the *Model Penal Code*,[181] and the Law Commission of England felt that it should be a crime in England to attempt in England to commit outside England any crime that is an extraterritorial offence under English law.[182]

RECOMMENDATION

55. That the *Criminal Code* provide that it is an offence to attempt *in* Canada to commit in another country an act or omission that constitutes an offence under the laws of both countries.

Present Canadian law appears to be that, except in respect of the extraterritorial offences prescribed in Canadian legislation, an attempt *outside* Canada, that takes place entirely abroad, to commit a crime (under Canadian law) in Canada is not an offence under Canadian criminal law; furthermore, by virtue of subsection 5(2) of the *Criminal Code*, it is not an offence in respect of which a person can be *convicted* in Canada. The *Model Penal Code*[183] would make such conduct an offence against the law of the place of intended completion of the crime. The English Law Commission in its Working Paper No. 29 expressed views similar to the *Model Penal Code* approach, subject to the requirement that the offence attempted be also an offence under local law.[184]

Consistent with our approach in respect of the offence of conspiracy, we feel that since we are dealing with another inchoate crime, namely conduct outside Canada that has not resulted in *actual* harm in Canada, an attempt outside Canada should not be punishable in Canada unless the attempt itself or the attempted result constitutes an offence under the law of the place where the attempt took place. Furthermore, again as in respect of the offence of conspiracy, we feel that some overt act in furtherance of the attempt should occur in Canada as a condition precedent to the exercise of jurisdiction by Canadian courts. (The overt act need not, of course, itself amount to an attempt or even a constituent element.) Such an act would provide at least some basis for the exercise of Canadian criminal jurisdiction under the territorial principle of international law.

RECOMMENDATION

56. That the *Criminal Code* make it an offence to attempt *outside* Canada to commit a crime if

(a) the crime attempted was an extraterritorial offence under Canadian federal legislation, *or*

(b) all the following conditions are met:

  (i) it was an attempt outside Canada knowingly to do something in Canada,

  (ii) that that "something" would constitute an offence under Canadian federal law and a criminal offence under the law of the place where the attempt took place, and

  (iii) some overt act in [connection with] [furtherance of] the attempt occurred in Canada, unless the attempt was to commit in Canada an offence inherently harmful to Canadian society — such as unlawful importation of drugs to be specified by Parliament as an exception to the "overt act" requirement.

IV. Counselling, Inciting or Procuring (Inchoate)

The considerations that we have mentioned in dealing with the inchoate offences of conspiracy and attempt, we think, apply also to the inchoate offences of counselling, inciting or procuring the commission of an offence under section 422 of the *Criminal Code* — that is, where the substantive offence is not completed or where the accused is not charged as a participant of a *completed* offence that he counselled, incited or procured another person to commit.

RECOMMENDATION

57. That the *Criminal Code*, in respect of inchoate crimes, make it an offence to counsel, procure or incite the commission of a crime, subject to the same conditions as we have recommended for "attempts" in Recommendations 55 and 56.

V. Party to Offence

A. Counselling, Inciting or Procuring

RECOMMENDATION

58. That the *Criminal Code* provide that anyone who counsels or procures the commission of an offence that is subsequently committed, is liable, under section 22 of the *Criminal Code*, *as a party to the offence* if the counselling or procuring was done outside Canada or in Canada for (a) the commission in Canada of an offence, or (b) the commission outside Canada of an extraterritorial offence under Canadian federal legislation, for example, passport forgery under section 58 of the *Criminal Code*.

B. Accessory after the Fact

Sections 23 and 421 of the *Criminal Code* make it an offence to be an accessory after the fact *in* Canada. We feel that being an accessory after the fact *outside* Canada should not be made an offence punishable in Canada *unless* it is proved that, *before* the offence was committed, the accessory agreed to assist, after the event, someone who committed the offence. Otherwise the conduct of the accessory after the fact outside Canada is simply too remote inasmuch as it occurs outside Canadian territorial jurisdiction *after* the substantive offence has been completed and was not a real factor leading to the commission of the offence. Indeed, in most cases (in the absence of a prior agreement of the accessory to aid the offender after the crime) the only jurisdictional basis for such conduct outside Canada to be tried as a crime before a Canadian court would be the nationality principle. However, we see no logical basis for differentiating between aliens and Canadian citizens in this regard. Of course, as noted earlier in this Paper, federal public servants of Canada, members of the Canadian Forces and certain other groups of persons outside Canada are, for valid reasons, subject to the criminal law of Canada in respect of all offences, or at least all indictable offences (including accessory after the fact) committed outside Canada, and therefore, they can be convicted under sections 23 and 421 for being an accessory after the fact outside Canada in respect of any such offence.

RECOMMENDATION

59. That the *Criminal Code* make it an offence to be an accessory after the fact by having received, comforted or assisted a person outside Canada who has committed an offence inside or outside Canada which is punishable under Canadian federal legislation, *if* the accessory had offered or agreed, *prior* to the commission of the substantive offence, to assist any perpetrator of the substantive offence after the commission of the offence.

PART FIVE:

FURTHER CONSIDERATIONS ON JURISDICTION OF CANADIAN CRIMINAL COURTS

CHAPTER TWELVE

Diplomatic Immunity

Although a detailed discussion of diplomatic and other immunities from criminal jurisdiction is beyond the scope of this Paper, we should mention that, in addition to foreign military personnel — whom we will discuss in the next chapter — a number of persons in Canada are immune from prosecution under Canadian criminal law — even for criminal offences committed in Canada. Apart from the common law immunity of the Queen and foreign sovereigns, these immunities are based on international conventions entered into by Canada and implemented by Canadian legislation. They include:

(a) The *Vienna Convention on Diplomatic Relations*, 1961[185] which provides in Article 31, paragraph 1, that "a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State...." Under Article 37, paragraphs 1, 2 and 3, the immunity of a diplomatic agent from criminal jurisdiction is extended to:

  (i) the members of the family of the diplomatic agent forming part of his household if they are not nationals of the receiving state,

  (ii) members of the administrative and technical staff of the mission (for example, embassy) together with members of their families forming part of respective households if they are not nationals of or permanently resident in the receiving state, and

  (iii) members of the service staff of the mission who are not nationals of or permanently resident in the receiving state, but only in respect of acts performed in the course of their duties.

Section 2 of the *Diplomatic and Consular Privileges and Immunities Act*,[186] confers "the force of law in Canada" on Articles 31 and 37 of the *Vienna Convention on Diplomatic Relations*.

(b) The *Vienna Convention on Consular Relations*, 1963,[187] Article 43 of which provides that consular officers and consular employees are not amenable to the jurisdiction of the judicial or administrative authorities of the receiving state *in respect of acts performed in the* *exercise of consular functions*. Section 2 of the *Diplomatic and Consular Privileges and Immunities Act* confers "the force of law in Canada" on Article 43.

(c) The *United Nations Convention on Privileges and Immunities*[188] confers immunity from criminal jurisdiction in the receiving state on representatives of states to the United Nations and, in respect of their United Nations duties, to officials (employees) of the United Nations. The convention is implemented in Canada by the *Privileges and Immunities (International Organizations) Act*[189] and Orders in Council made pursuant to it.

None of the three conventions authorizes the courts of foreign states to conduct criminal trials of their diplomatic or other personnel or dependents *in* the receiving state. The foreign state or, in the case of United Nations personnel, the Secretary General of the United Nations, may either waive the immunity of the person (whereupon the courts of the receiving state could try that person), or remove the person from the receiving state (for possible trial in his home state).

Canadian diplomatic, consular or United Nations personnel serving in countries outside Canada, who are entitled to immunities there from the local criminal jurisdiction, are not immune from Canadian criminal law and jurisdiction if they are "employee(s) within the meaning of the *Public Service Act*"; this is because under subsection 6(2) of the *Criminal Code*, such employees may be tried in Canada for indictable offences committed outside Canada. (See Chapter Six of this Paper for further discussion in this regard.) However, other employees of the Government of Canada and members of their households abroad, although they enjoy diplomatic, consular or United Nations immunity, are not subject to Canadian criminal law under subsection 6(2) of the *Criminal Code*. Hence, in their cases, if the Government of Canada (or the United Nations in the case of United Nations personnel) did not waive their immunity from the local (foreign) jurisdiction, they would not be triable for most indictable offences committed in the host state as the foreign courts would not have jurisdiction to try them, and Canadian courts do not have jurisdiction to try them.

RECOMMENDATIONS

60. That, for the sake of completeness, the *Criminal Code* (General Part) mention or refer to the classes of persons who are immune and the extent to which they are immune from the jurisdiction of criminal courts in Canada, and also mention the statutes conferring the immunity.

61. That the General Part of the *Criminal Code* make the criminal law of Canada applicable to members of the household of Canadian federal public servants abroad who are immune from criminal prosecution under the *Vienna*

***Conventions* of 1961 and 1963 or other Conventions, and also make such persons subject to prosecution in Canada for offences committed in the host state under the same conditions as the public servant concerned.**

In this connection it will be recalled that in Chapter Six of this Paper (Recommendations 33 and 34) we have recommended that subsection 6(2) of the *Criminal Code* be amended to apply conditionally to *all* Canadian federal public servants serving outside Canada.

CHAPTER THIRTEEN

Armed Forces

I. Canadian Forces in Canada

The *National Defence Act* provides that service tribunals of the Canadian Forces have jurisdiction to try members of the Canadian Forces for criminal offences committed in Canada[190] (other than murder, manslaughter, sexual assault offences under sections 246.1 through 246.3, or abduction offences under sections 249 through 250.2 committed in Canada).[191] It also provides that nothing in the Code of Service Discipline affects the jurisdiction of civil courts to try offences.[192] It also provides that after an accused has been tried by a service tribunal or a "civil" (meaning "criminal") court for an offence, he cannot be tried *by a service tribunal* for the same offence.[193] Thus, while the service tribunals (military courts) and criminal courts have concurrent criminal jurisdiction over members of the Canadian Forces, the criminal courts appear to have pre-emptive jurisdiction. Indeed, subsection 61(2) of the *National Defence Act* envisages that a civil court may try an accused who has already been tried by a service tribunal. However, subsection 61(2) is probably of no force or effect now because of the *Canadian Charter of Rights and Freedoms* paragraph 11(*h*) and the *Constitution Act, 1981* subsection 52(1).

II. Foreign Forces in Canada

Pursuant to customary international law, a military, naval or air force from one state (sending state) which is visiting another state (receiving state) at the invitation of the latter, has some immunity from the jurisdiction of the criminal courts of the receiving state. That this rule of international law is applicable to non-Canadian armed forces visiting Canada is clear from the opinion of the Supreme Court of Canada on a reference concerning United States forces in Canada.[194] However, as seen in the various opinions expressed by the judges in that case, the *extent* of that immunity under *customary* international law is not clear.

According to Kerwin J.:

> The general rule is that everyone in Canada ... is subject to the laws of the country and to the jurisdiction of our courts, but ... there are several well-known exemptions. These exemptions are grounded on reason and recognized by civilized countries as being rules of international law which will be followed in the absence of any domestic law to the contrary. By international law there exists an exemption from criminal proceedings prosecuted in Canadian criminal courts of the visiting members of the United States forces....[195]

Rand J. was of the opinion that the customary international law rule was not so broad as to confer complete immunity. In his opinion:

> The members of United States forces are exempt from criminal proceedings in Canadian courts for offences under local law committed in their camps or on their warships, except against persons not subject to United States service law, or their property, or for offences under local law, wherever committed, against other members of those forces, their property and the property of their government; but the exemption is only to the extent that United States courts exercise jurisdiction over such offences.[196]

Parliament enacted the *Visiting Forces Act*,[197] to govern the status of visiting forces in Canada in respect of criminal and other matters. Under that Act, which was amended in 1972[198] the Governor in Counsel has authority to apply the Act to the forces of any designated state in Canada. Under subsection 6(2) of the Act, the courts of the visiting force have the primary right to exercise trial jurisdiction in Canada over a member of the visiting force on a charge of having committed an offence:

(a) against the property of the designated state;

(b) against the security of the designated state;

(c) against the person or property of another member of the visiting force or its civilian component or a dependent of such a member; or

(d) in the performance of official duties.

III. Canadian Forces outside Canada

It should be noted that the *Visiting Forces Act*,[199] does not apply to members of the Canadian Forces serving outside Canada. They are, pursuant to sections 120 and 121 of the *National Defence Act*,[200] subject to the criminal law of Canada while serving abroad and also to the criminal law of the state in whose territory they are serving (the receiving state). They are subject to the concurrent jurisdiction of Canadian service tribunals and the courts of the receiving state. Their immunity in certain cases from the jurisdiction of the criminal courts of the receiving state flows, in the absence of a treaty or other agreement in that respect between Canada and the receiving state concerned, directly from customary international law. Most often the matter is governed by a bilateral agreement between Canada and the receiving state or by a multilateral agreement to which Canada and the receiving state are parties.

In states of the North Atlantic Treaty Organization (NATO), the customary international law rules have been replaced by express provisions in a multilateral agreement governing the exercise of jurisdiction by the courts of the receiving and sending states over members of visiting armed forces from a NATO state. The agreement, called the *North Atlantic Treaty Status of Forces Agreement* or "NATO SOFA" was signed in 1951 and applies to all NATO states.[201]

Under Article VII of the NATO SOFA, the service tribunals of the Canadian Forces serving in any NATO state (for example, the United States, the United Kingdom, or the Federal Republic of Germany), have primary jurisdiction to try members of a Canadian visiting force and members of the civilian component of the Canadian Forces (including — to the extent authorized by Canadian law — Canadian civilian school teachers of Canadian dependant children there and civilian employees from Canada working for the Canadian Forces there) for (i) offences solely against the property or security of Canada, or offences solely against the person or property of another member of the Canadian visiting force, or civilian component of the Canadian visiting force or dependant of either, and (ii) offences arising out of any act or omission done in the performance of official duty.[202]

In all other cases, the courts of the receiving state have the primary right to exercise jurisdiction.[203]

The NATO SOFA further provides that the state having primary jurisdiction shall give sympathetic consideration to a request from the other state for a waiver of that jurisdiction.[204]

The division of jurisdiction in criminal matters under the NATO SOFA has worked extremely well in practice. In almost all cases where the receiving state has had primary jurisdiction, a request for waiver by a visiting Canadian Force has been granted. The offender is protected against double jeopardy by a provision in the NATO SOFA that, where a member of the visiting force or civilian component or dependant has been tried by a court of the sending state or receiving state in respect of a particular offence, he or she may not be tried again for that same offence by a court of the other state.[205]

In states in which a United Nations force is serving, members of the United Nations force are usually immune from the criminal jurisdiction of the courts of the host states pursuant to agreements or arrangements made by the United Nations with the governments of the host states. For example, pursuant to an agreement between the United Nations and the Government of Cyprus,[206] members of the Canadian Forces contingent serving with the United Nations Force in Cyprus are immune from the jurisdiction of the Cypriot criminal courts. Under the same agreement, the military courts of the Canadian contingent have jurisdiction to conduct trials of members of the contingent for military and criminal offences under Canadian law committed in Cyprus.

Before sending members of the Canadian Forces to serve abroad in a non-NATO state outside the aegis of the United Nations, Canada usually tries to make arrangements with the host state — including arrangements for the exercise of criminal jurisdiction.

It will be seen from the foregoing that members of the Canadian Forces serving abroad have a status similar to diplomats insofar as they are frequently granted immunity from the jurisdiction of the criminal courts of the receiving state. However, they — unlike Canadian diplomats — are subject to trial by Canadian military courts abroad and civil courts in Canada[207] for criminal offences committed abroad. A concern that we have in this regard is that, while we recognize that it is essential for reasons of discipline that Canadian military tribunals have jurisdiction over members of the Canadian Forces and accompanying personnel abroad, we feel that it should probably be limited to offences under Canadian law.

At the present time, under section 121 of the *National Defence Act*:

> (1) An act or omission that takes place outside Canada and would, under the law applicable in the place where the act or omission occurred, be an offence if committed by a person subject to that law, is an offence under this Part, and every person who is found guilty thereof is liable to suffer punishment as provided in subsection (2).
>
> (2) Subject to subsection (3), where a service tribunal finds a person guilty of an offence under subsection (1), the service tribunal shall impose the punishment in the scale of punishments that it considers appropriate, having regard to the punishment prescribed by the law applicable in the place where the act or omission occurred

> and the punishment prescribed for the same or a similar offence in this Act, the *Criminal Code* or any other Act of the Parliament of Canada.

Section 121, in effect, incorporates offences under the criminal law of every country in the world into the Canadian Code of Service Discipline. The result is that offences against sections of foreign penal codes, that are probably couched in language commensurate with, and influenced by, the legal system and criminal procedure applicable to trials by the courts of the country concerned, are prosecuted under Canadian trial procedures that may be completely alien to, and that may fail to provide safeguards envisaged by, the drafters of the foreign offences. For example, the loose definition of the offence in the foreign law may be premised on the assumption that the judge will have been professionally trained as a judge in that foreign legal system.

In any event, where a person is charged with an offence under a foreign law, we think it may be wrong in principle to subject that person to trial (on that foreign offence) under our judicial system that has not been designed and developed to implement prosecution of *that* offence. We wonder if the scope of offences under the federal statutes and regulations of Canada, all of which are applicable under section 120 of the *National Defence Act*, would not suffice to cover all, or most, of the conduct of members of Canadian Forces serving outside Canada that Canada would wish to prosecute them for, and whether therefore, section 121 of the *National Defence Act* concerning foreign law should not be repealed. Could not disciplinary offences take care of the rest so that there would be no need for Canadian service tribunals to try Canadian service personnel for offences under foreign laws?

We appreciate that contraventions of local laws in foreign countries may be difficult to charge properly under Canadian enactments — for example, traffic offences. In this connection the House of Lords in the English case of *Cox* v. *Army Council*[208] looked at the issue (on appeal) as to whether, under the wording of section 70 of the *Army Act, 1955*, a British soldier could, in respect of his conduct in Germany, legally be convicted of an offence under the *English Road Traffic Act, 1960* (which in itself was restricted to applicability in England). The headnote in that case reads:

> By section 70 of the *Army Act*, 1955: "(1) Any person subject to military law who commits a civil offence, whether in the United Kingdom or elsewhere, shall be guilty of an offence against this section. (2) In this Act the expression 'civil offence' means any act or omission punishable by the law of England or which, if committed in England, would be punishable by that law; and in this Act the expression 'the corresponding civil offence' means the civil offence the commission of which constitutes the offence against this section...."
>
> By section 3(1) of the *Road Traffic Act*, 1960: "If a person drives a motor vehicle on a road without due care and attention, or without reasonable

consideration for other persons using the road, he shall be liable on summary conviction to a fine not exceeding £40...."

By section 257(1): "... 'road' means any highway and any other road to which the public has access, and includes bridges over which a road passes...."

The appellant, while serving with the British Army in Germany, was charged before a district court martial held there with "committing a civil offence contrary to section 70 of the *Army Act*, 1955, that is to say, driving without due care and attention contrary to section 3(1) of the *Road Traffic Act*, 1960, in that he at Sundern on September 15, 1960, drove a motor vehicle on a road without due care and attention." He was convicted: —

Held, (1) that section 70 of the [Army] Act of 1955 is an offence-creating section, providing that acts or omissions which apart from it would not be offences become offences by virtue of it....

(2) That if the offence charged is one of a nature that can be committed only in England the section cannot operate....

(3) That, even though the *Road Traffic Act*, 1960, had no application except to acts done on the roads of England (post, p. 72), the offence charged had a character of universality which brought it within the scope of section 70 of the Act of 1955....

Per Lord Reid. The question is not whether the road on which the appellant was driving was a road within the meaning of the *Road Traffic Act*, but whether there was the requisite degree of similarity between what he did and an act done in England which would have been contrary to section 3(1) of that Act....

The Canadian counterpart of section 70 of the British *Army Act* is paragraph 120(1)(*b*)of the *National Defence Act*[209] of Canada which reads:

> **120** (1) An act or ommission ...
>
> (*b*) that takes place outside Canada and would, if it had taken place in Canada, be punishable under Part XII of this Act, the *Criminal Code* or any other Act of the Parliament of Canada;
>
> is an offence under this Part and every person convicted thereof is liable to suffer punishment as provided in subsection (2).
>
> (2) Subject to subsection (3), where a service tribunal convicts a person under subsection (1), the service tribunal shall,
>
> (*a*) if the conviction was in respect of an offence
>
> (i) committed in Canada, under Part XII of this Act, the *Criminal*

Code or any other Act of the Parliament of Canada and for which a minimum punishment is prescribed, or

(ii) committed outside Canada under section 218 of the *Criminal Code*,

impose a punishment in accordance with the enactment prescribing the minimum punishment for the offence; or

(*b*) in any other case,

(i) impose the penalty prescribed for the offence by Part XII of this Act, the *Criminal Code* or that other Act, or

(ii) impose dismissal with disgrace from Her Majesty's service or less punishment.

The decision in *Cox* v. *Army Council* may broaden somewhat the intended scope of the provisions of section 120 of the *National Defence Act*; but, given the division of legislative powers between the federal Parliament and the provincial legislatures in Canada, section 120 of the *National Defence Act* as it is now worded could never be construed to be as wide as its British counterpart — section 70 of the British *Army Act*. For example, a road traffic incident abroad, that would have been an offence under a provincial *Highway Traffic Act* if it had taken place in Canada, cannot be prosecuted as such under section 120 of the *National Defence Act*, because that section only incorporates Canadian *federal* offences; whereas conduct outside England that would have been an offence under the *English Road Traffic Act* if it had taken place in England can be prosecuted before British military tribunals under section 70 of the British *Army Act*. Still, given *Criminal Code* offences such as criminal negligence in the operation of a motor vehicle (subsection 233(1)), dangerous driving (233(4)) and impaired driving (234(1)), we wonder whether there is really any need to retain section 121 of the *National Defence Act* to accommodate prosecution by Canadian military courts of motor vehicle offences under foreign law committed by members of the Canadian Forces outside Canada and persons accompanying them. They could be charged under section 120 of the *National Defence Act* and the *Criminal Code*.

On the other hand we recognize that more than motor vehicle offences are involved and that there are benefits to Canada and the accused in our courts being able to try offences under foreign law. In particular:

(a) if foreign criminal law is to be applied to Canadians it can be applied *by* Canadians using Canadian procedures and punishments which, while they may not necessarily be superior to those of the local law, are *ones* with which the accused is probably at least generally aware, and in respect of which the procedural law (at least) is readily available in a language that he understands; and

(b) it puts Canadian authorities in a better position to request foreign authorities to waive their jurisdiction, for they (Canadian authorities) can say that Canadian tribunals have jurisdiction under Canadian law to try persons charged with offences against the foreign law.

Furthermore, since, in private international law (conflicts), the courts of one state regularly apply the laws of other states, and since the choice of law principles of "reasonableness" and "*forum conveniens*" and "closest connection" developed in private international civil law are spreading to public international criminal law, why should not Canadian courts, in cases where these principles obtain, apply the foreign criminal law — particularly when the foreign state agrees, or at least does not object, to its criminal law being applied in a trial before a Canadian court? Indeed, Canadian authors Williams and Castel have suggested the adoption of a "proper law" concept in criminal cases outside the military context. In their view :

> If the "proper law" concept were adopted, it would not matter where the case were tried. In this way the problem of jurisdiction over the offence would become less important as the forum would not necessarily be applying its own law.[210]

But there is still another point to consider. If it is necessary to make persons outside Canada, who are subject to the Code of Service Discipline, subject to offence-creating provisions in addition to the provisions of Canadian federal enactments, why not apply provincial law? Section 120 of the *National Defence Act* could be amended to incorporate offences under the law of the appropriate province of Canada in each case. Of course, some mechanism for designation or choice of provincial law in each case would have to be provided in the legislation — perhaps based on the official statement of ordinary residence for voting purposes that forms part of the Canadian Forces records of each member of the Forces under section 27 of Schedule II of the *Canada Elections Act*.[211]

After having looked at reasons for and against the retention of section 121 of the *National Defence Act* we think that all we can do at this stage is raise the matter for governmental consideration.

RECOMMENDATION

62. That the Government of Canada consider whether present provisions of section 121 of the *National Defence Act* should be repealed and, if so, whether to replace the foreign law offences with offences against the laws of the provinces of Canada.

CHAPTER FOURTEEN

Extradition/Rendition

Whenever a person in Canada is charged with, or convicted of, an offence under foreign law by authorities of another country, or a person in another country is charged with or convicted of an offence under Canadian law, a question arises as to what procedures and means are available to apprehend and return the offender or fugitive to the other country or Canada respectively.

The formal method and procedure whereby a person who is in one country may be apprehended by the authorities of that country and turned over to the authorities of another country on a charge of having committed an offence or for having been convicted of an offence, is called "extradition" or, as between British Commonwealth countries, "rendition."

Extradition or rendition may not be necessary. The accused person may voluntarily return to the country in which he is to be tried, or, as happened recently to a Canadian citizen in Toronto who was accused of crimes in Florida, he may be abducted by officials or agents of that country while in another country. It is interesting to note that in the latter event, even though the abduction itself could well be an offence under the criminal law of the country where it occurred, and could, as an infringement of the sovereignty of that country, also be contrary to international law, a resultant trial (on the substantive offence in respect of which the accused was returned) in England, the United States or Canada would appear to be lawful under the law of those countries.[212]

International law does not confer a right on any country to extradite a person from another country. One must therefore look to extradition treaties or other relevant agreements between countries to ascertain what countries have what extradition rights *vis-à-vis* what other countries.

Extradition from Canada is governed by the *Extradition Act*[213] and treaties between Canada and other countries.

Extradition to Canada is legally governed by treaties between Canada and other countries and practically by the implementing legislation of the other countries.

Rendition from Canada is governed by the *Fugitive Offenders Act*.[214]

Rendition to Canada is governed by the counterpart of the British *Fugitive Offenders Act* in force in the other British country concerned.

By section 2 of our *Fugitive Offenders Act*, rendition from Canada applies, in respect of accused persons, only to offences committed "in any part of Her Majesty's Realms or Territories *except* Canada." The expression "Her Majesty's Realms and Territories" is not defined in the *Fugitive Offenders Act*. It is defined in the *Interpretation Act*[215] to mean "all realms and territories under the sovereignty of Her Majesty."

By the definition of "fugitive" in section 2 of the *Extradition Act*, a person may only be extradited from Canada for an offence "committed within the jurisdiction of a foreign state." It is not clear whether the word "jurisdiction" as used in section 2 means "territory" or other bases of criminal jurisdiction. Williams and Castel feel that although :

> [a]t one time the use of the word "jurisdiction" may have had connotations of the strict territorial principle [,] [t]oday a wider approach is taken and unless territory is stressed in the treaty, "jurisdiction" may be interpreted to include all the bases of jurisdiction.[216]

However, no authority is cited for that statement, and the wording of the two Acts as quoted above could tend to the opposite conclusion — especially when read in the light of cases such as *Re Commonwealth of Virginia and Cohen*.[217]

The *Extradition Act* and the *Fugitive Offenders Act* have other serious shortcomings — a number of which would have been corrected if *Bill S-9*, which was introduced in 1979, had been passed. That Bill would have enacted a new *Fugitive Offenders Act* and modernized the *Extradition Act*. Unfortunately, it died on the Order Paper. We are therefore left with our two Acts that :

(a) while prohibiting "extradition" for political offences permit "rendition" for them;

(b) while asserting that an accused "extradited" for one crime cannot be tried for another, do not provide this safeguard for "renditions"; and

(c) while, for "extradition" purposes, hold that the conduct in question must amount to a criminal offence under the law of both the requesting state and Canada, do not make this a requirement for "rendition" where an offence against the requesting state law suffices.

The above differences between "extradition" and "rendition" were probably justifiable when a common system of criminal law and jurisdiction applied to all "Her Majesty's Realms and Territories." It is doubtful that they are justifiable today given the great changes in the form of government and in the law of many of the states of the Commonwealth that have occurred since the *Fugitive Offenders Act* was drafted as the United Kingdom's *Fugitive Offenders Act* of 1881.

While we cannot, in the course of this general study on jurisdiction, do more than scratch the surface of the large and complex subjects of extradition and rendition, we have seen enough to convince us of the need to modernize our statutes concerning these subjects. However, before that can be done, the federal Government will have to seek answers to questions such as : Should "political offence" be defined in legislation? Does Canada need two Acts? Would not one suffice? Is there any longer a need to differentiate between "extradition" and "rendition?" Should depositions from other countries admitted in evidence at extradition hearings in Canada be subject to the hearsay rule or be subject to their deponents being cross-examined?

RECOMMENDATION

63. That the *Extradition Act* and the *Fugitive Offenders Act* be amended to provide for uniformity of treatment of persons under both Acts.

CHAPTER FIFTEEN

Double Jeopardy

Whenever jurisdiction is exercised by a court of one state over an offence committed outside its territory, a court of another state will usually have concurrent jurisdiction over the same offence. In such cases there is double jeopardy.

Pursuant to paragraph 11(*h*) of the *Canadian Charter of Rights and Freedoms* : [a]ny person charged with an offence has the right ... if finally acquitted of the offence not to be tried again and, if finally found guilty and punished for the offence, not to be tried or punished for it again. The *Criminal Code* provides protection against being tried twice in Canada for substantially the same offence (section 535). However, apart from a few statutory provisions in respect of particular offences,[218] Canadian law does not expressly provide, and it is difficult to assert with any certainty, what would happen if a person were charged before a Canadian court with an offence for which he had been previously tried and acquitted or convicted by a court in another country. There are a few English cases indicating that he might successfully plead *autrefois acquit* or *autrefois convict*, but they do not delve deeply into the problem.[219]

The validity of the pleas of *autrefois acquit* and *autrefois convict* depends upon whether the offence charged is "substantially *the same as*"[220] the offence upon which the accused was previously tried. In the international context however, one would rarely be faced with two exactly corresponding offences.[221] In our opinion the principle of double jeopardy in respect of extraterritorial offences or transnational offences should therefore apply to "substantially *similar*," rather than "substantially *the same*" offences under the laws of Canada and the other country concerned. Certainly they would have to conform in terms of what conduct constituted the offence and possibly in terms of the gravity of the offence. (The type and severity of the penalty prescribed in the law could, among other things, be indicators of the gravity.)

Though our final recommendations on this aspect of extraterritorial jurisdiction may have to await an opportunity for this Commission to do an in-depth study of double jeopardy generally, we are inclined at the moment to agree with the sentiments expressed by Professor Glanville Williams that, where a person has previously stood trial in one state :

> [J]ustice requires that [the] accused person should be able to plead *autrefois convict* or *acquit* in a ... [second] state to the same extent as if he had previously stood trial in [the second state].[222]

The *Criminal Code* so provides with respect to some, but relatively few, offences, namely : (i) offences relating to aircraft, (ii) offences against internationally protected persons, (iii) offences by public employees, and (iv) conspiracy offences.[223]

Under English law an acquittal by a court of competent jurisdiction outside England is a bar to an indictment for the same offence before any tribunal in England.[224] But should that be so in all cases of acquittal? If an acquittal in a foreign court was based on a defence that could not successfully be advanced in Canada, justice does not necessarily require that further proceedings be barred in Canada. If, for example, in State "A" it is a defence (to a charge of murder or manslaughter against a husband for killing his wife) to prove that the husband killed his wife when he caught her in an act of adultery, should Canadian courts be denied jurisdiction in the case, say, of a federal public servant of Canada who kills his spouse in State "A" and, after acquittal in State "A," is returned to Canada and here charged with murder under subsection 6(2) of the *Criminal Code*? What if the foreign acquittal was based on a defence of lapse of time which is accepted in some countries as a plea in bar of trial?

Is a subsequent trial by a court in Canada (after a trial in another country by a foreign court) really any different in principle from a new trial by a court in Canada, ordered, on appeal from a trial in Canada, because of an error in law by the court at the first trial in Canada? It would be true to say that what was applied at the first trial in Canada was not "law" in Canada. Similarly, the acquittals by the foreign courts mentioned above would clearly be based on grounds that were not "law" in Canada. We are therefore inclined to differentiate between the legal recognition to be given by Canadian courts to acquittals by foreign courts as compared to convictions by foreign courts. However, the consensus of all the consultation groups with whom we have discussed the matter is that it would be presumptuous and unreasonable to so differentiate. Accordingly, the following recommendation has been drafted with a view to attracting further comments as to whether the words in square brackets should be deleted.

RECOMMENDATIONS

64. That the *Criminal Code* provide for a plea of *autrefois convict* or *autrefois acquit* or pardon being based on a previous trial in a state other than

Canada for any offence substantially similar to the one in respect of which the plea is made, and for such a plea to be treated by Canadian courts as though the plea were based on a trial in a Canadian court [unless, in the case of a previous acquittal, it resulted from a substantive or procedural defence not available under Canadian law].

65. As a matter of form, we also recommend that the subject of double jeopardy in respect of convictions and acquittals by foreign courts be dealt with in a new provision in the General Part of the *Criminal Code*, and that subsections 6(4) and 423(6) be repealed.

PART SIX :

CONCLUSION

CHAPTER SIXTEEN

Proposed Reformulation of the Jurisdictional Provisions of the *Criminal Code* — Discussion

At this point we would like to consider whether the *Criminal Code* adequately provides for trial in Canada of all its extraterritorial offences.

As we have noted earlier in this Paper, the *Criminal Code*, and some other Canadian statutes that contain criminal law provisions, specifically mention in some of their offence-creating sections that the act or omission thereby prohibited constitutes the offence when the act or omission occurs *outside* Canada, for example, subsections 58(1) (passports) and 75(2) (piracy) of the *Criminal Code*, and section 13 of the *Official Secrets Act*. These we will refer to as "extraterritorial offence sections."

Some extraterritorial offence sections (in addition to providing for the extraterritorial applicability of the offence) also specify which criminal courts in Canada have jurisdiction to try the extraterritorial offence; in the *Criminal Code* they are subsections 6(3) and 423(5). These we will refer to as "extraterritorial jurisdiction provisions." However, the remaining extraterritorial offence sections of the *Criminal Code* do *not* state what courts shall have jurisdiction to try the offences. These are : subsection 46(3) (treason), section 58 (passport forgery), section 59 (fraudulent use of certificate of citizenship), section 75 (piracy), section 76 (piratical acts), paragraph 243(1)(*b*) (sending or taking unseaworthy ship to sea) and paragraph 254(1)(*b*) (bigamy).

In Chapter Seven we gave some reasons why we think that Parliament should expressly confer jurisdiction on Canadian courts to try the extraterritorial offences of treason and bigamy. We would like now to examine in more detail the question whether Canadian courts have jurisdiction to try all the extraterritorial offences mentioned in the immediately preceding paragraph.

Must it be assumed that the subsequent presence of the accused within the territorial jurisdiction of any court of criminal jurisdiction in Canada is sufficient to confer jurisdiction on that court to prosecute him or her for an extraterritorial offence such as an offence of piracy committed in the Indian Ocean in foreign-registered ships? Paragraph 428(*a*) of the *Criminal Code* reads :

> **428.** Subject to this Act, every superior court of criminal jurisdiction and every court of criminal jurisdiction that has power to try an indictable offence is competent to try an accused for that offence
>
> (*a*) if the accused is found, is arrested or is in custody within the territorial jurisdiction of the court; ...

But does paragraph 428(*a*) cover extraterritorial offences? The following points must be considered :

(a) At common law the accused has a *prima facie* right to be tried in the country in which the offence was committed, and this rule, in the absence of a court-ordered change of venue, continues except as *modified by this section*.[225]

(b) The opening words of section 428 of the *Criminal Code* : "Subject to this Act," inclusively refer to section 434 of the *Criminal Code* which states in part : "(1) ... nothing in this Act authorizes a court in a province to try an offence committed entirely in another province." Subsection 3 of section 434 provides exceptions "where an accused is charged with an offence that is alleged to have been committed *in Canada* outside the province in which he is."

(c) Section 437 of the *Criminal Code* provides that "[w]here an offence is committed *in a part of Canada, not in a province*, proceedings in respect thereof may be commenced and the accused may be charged, tried and punished in any territorial division in any province in the same manner as if that offence had been committed in that territorial division."

(d) There is no provision similar to section 437 with respect to offences committed *outside* Canada.

(e) Section 455 of the *Criminal Code* provides in what cases a Justice may receive an information.

(f) It will be noted that paragraph 455(*a*) of the *Criminal Code* is not unqualified authorization for a Justice to receive an information in respect of an offence committed anywhere outside his territorial jurisdiction; rather, the Justice shall only receive an information where it is alleged that the person has committed anywhere *an indictable offence that may be tried in the province in which the Justice resides*. As mentioned above, the sections of the *Criminal Code* (434 *et seq.*) that deal with out-of-province offences only deal with offences committed in other parts of Canada.

Thus, the *Criminal Code* scheme of things would seem to be that, insofar as offences committed outside Canada are concerned, it is left to individual offence provisions of the *Criminal Code* such as sections 6 and 423, or individual provisions of other Acts such as subsections 6(1), (4) and (6) of the *Aeronautics Act*,[226] to provide expressly for the jurisdiction of courts in Canada to try extraterritorial offences.

But, regardless of what is the present scheme of things, it is obvious that a new *Criminal Code* should expressly provide not only what offences can be committed outside Canada, but also what courts in Canada have jurisdiction to try those offences. The obvious possibilities are :

(a) to insert an extraterritorial jurisdiction provision in every extraterritorial offence section; or,

(b) to insert a general extraterritorial jurisdiction provision in the General Part of the *Criminal Code* or in the Jurisdiction Part (now Part XII) of it, *and* either :

  (i) word the general extraterritorial provision so that it applies to all extraterritorial offences, in which case the present extraterritorial jurisdiction provisions of extraterritorial offence sections could (perhaps should) be deleted, or

  (ii) word the general extraterritorial jurisdiction provision so that it applies only to extraterritorial offence sections other than those that now include extraterritorial jurisdiction provisions.

We prefer the (b)(i) approach.

Furthermore, if the General Part of the *Criminal Code* were to spell out fully which offence-creating provisions have extraterritorial *applicability*, there would be no need for each extraterritorial offence section to state expressly that it applies outside Canada, for example, section 58 (passport forgery).

Adoption of these approaches would mean that no longer would one have to look in different Parts of the *Code* to answer the two questions : Does this offence section of the *Criminal Code* apply outside Canada and what Canadian courts have jurisdiction to try the offence? Rather, the answers would be readily and simply available in the General Part of the *Criminal Code*. The *Criminal Codes* of many countries have been structured in that way; they include the People's Republic of China, Columbia, the Federal Republic of Germany, Greece, Italy, Norway, Poland and Turkey.[227]

What we envisage then is a *Criminal Code* :

(a) which would no longer be *implicitly* based on the premise that the applicability of its offence sections is limited to the territory of Canada;

(b) whose offence sections would *not* expressly restrict themselves to the territory of Canada; (there would be no change here from most of the present offence sections of the *Criminal Code* but there would be changes in sections such as 46(1) which speak of "in Canada");

(c) which would no longer include in extraterritorial offence sections, provisions that the offences are applicable outside Canada (sections 6, 46(3), 58, 59, 75, 76, 254(1)(*b*) and 423(3) and (4));

(d) which would no longer include in some extraterritorial offence-creating sections, provisions as to the jurisdiction of Canadian courts over the respective extraterritorial offences, for example, subsections 6(3) and 423(5); but

(e) which would include a provision in the General Part stating what offences are exceptions to the general rule that the applicability of the offence sections under the *Criminal Code* is territorially restricted to Canada; and

(f) which would include a jurisdiction provision in the General Part stating the conditions under which persons may be tried by Canadian courts for the exceptional offences (that is, those referred to in (e)) committed outside Canada.

RECOMMENDATIONS

66. That in the *Criminal Code* :

(a) the words "in Canada" or "outside Canada" or words similar thereto, be deleted from offence-creating provisions;

(b) the General Part specify which offence-creating provisions have extraterritorial applicability;

(c) the jurisdictional provisions be deleted from offence-creating sections 6 and 423; and

(d) the General Part specify the jurisdiction of courts in Canada to try the specified extraterritorial offences.

67. That the General Part expressly state also that, except as otherwise provided in the *Criminal Code* or any other Act of the Parliament of Canada, the applicability of the offence-creating sections of the *Criminal Code* be limited to conduct in Canada.

The purpose of this recommendation would be to codify the common law presumption mentioned by Lord Reid in 1971 that :

> It has been recognized from time immemorial that there is a strong presumption that when Parliament, in an Act applying in England, creates an offence by making certain acts punishable it does not intend this to apply to any act done by anyone in any country other than England.[228]

CHAPTER SEVENTEEN

Summary of Recommendations

(Page references are to the recommendations themselves, which may be preceded or followed by a discussion of their content.)

I. General

1. In the General Part of the *Criminal Code* briefly mention the international law bases of national criminal jurisdiction, and that, subject to relatively few statutory exceptions, the basis of Canadian criminal law and jurisdiction of Canadian courts is the territorial principle. (See page 14)

II. Place of Commission of Offence

A. Canadian Territory

2. In the General Part of the *Criminal Code* define "Canada," that is, the territorial limits of Canada for criminal law purposes, as including the Canadian Arctic, the internal waters of Canada and the territorial sea of Canada. (See page 17)

B. Territorial Sea of Canada

3. Amend subsection 433(2) of the *Criminal Code* to provide that the consent of the Attorney General of Canada (for prosecution of offences that occur in the territorial sea of Canada) is only required for prosecution of non-Canadians for indictable offences on *non*-Canadian ships. (See page 18)

4. Provide in the *Criminal Code* that charts issued by the Minister of Energy, Mines and Resources under section 6 of the *Territorial Sea and Fishing Zones Act* are conclusive evidence of the limits of the territorial sea of Canada. (See page 20)

5. Provide in the *Criminal Code* that, in the absence of a chart having been issued by the Minister of Energy, Mines and Resources, the Secretary of State for External Affairs may conclusively declare whether or not a place is within the territorial sea, internal waters, fishing zones, exclusive economic zones, or continental shelf of Canada. (See page 20)

6. Define the territorial sea of Canada in the *Criminal Code* by reference to section 3 of the *Territorial Sea and Fishing Zones Act*. (See page 20)

7. Amend defective definition of "territorial sea" in section 3 of the *Territorial Sea and Fishing Zones Act* to define the outer limits of the territorial sea as follows :

> **... as the outer limits, lines drawn parallel to and equidistant from such baselines so that each point on an outer limit is distant twelve nautical miles seaward from the nearest point of a baseline.** (See page 21)

C. Fishing Zones of Canada

8. Provide in the *Criminal Code* that Canadian criminal law is applicable to, and Canadian courts have jurisdiction over, any offence committed in the fishing zones or exclusive economic zones of Canada by (a) Canadian citizens or (b) by non-Canadian citizens *if*, at the time of the offence, either the offender or the victim was engaged in, or present there in connection with, activities over which Canada has sovereign rights under international law. (See pages 29 and 30)

9. The preceding recommendation applies also to Canadian anti-pollution zones in the Arctic. (See page 30)

10. Provide in the *Criminal Code* that Canadian criminal law be applicable to, and Canadian courts have jurisdiction over, any offence committed on, or

within 500 metres of, any artificial island, installation or structure in the fishing or exclusive economic zones of Canada by a Canadian citizen or by a non-Canadian citizen if, at the time of the offence, either the offender or the victim was engaged in, or was present there in connection with, activities over which Canada has sovereign rights under international law. (See page 31)

D. Continental Shelf of Canada

11. Provide in the *Criminal Code* that Canadian criminal law be applicable to, and Canadian courts have jurisdiction over, any offence committed on or within 500 metres of any artificial island, installation or structure on or over the continental shelf of Canada, by a Canadian citizen or by a non-Canadian citizen if, at the time of the offence, either the accused or the victim was engaged in, or present there in connection with, activities over which Canada has sovereign rights under international law. (See page 33)

E. High Sea

12. Provide in the *Criminal Code* that Canadian criminal law be applicable to, and Canadian courts have jurisdiction over, any offence committed by anyone (Canadian citizen and non-Canadian citizen alike) on, or within [500 metres] [one nautical mile] of any artificial island, [ice island], installation or structure under the administration and control of the Government of Canada or of a Province of Canada or an agency thereof on the high seas seaward beyond the territorial seas of Canada, other than on ships of non-Canadian registry, if either the offender or the victim at the time of the offence was engaged in, or there in connection with, activities over which Canada has sovereign rights under international law. (See page 35)

F. Ships

13. Repeal subsection 683(1) of the *Canada Shipping Act* and replace it with a provision in the *Criminal Code* General Part to apply Canadian criminal law to Canadian ships everywhere and to everyone on board them. (See page 43)

14. In respect of offences committed outside Canada on Canadian ships, provide in the *Criminal Code* General Part for jurisdiction to be exercised by a court in any place in Canada where the accused happens to be after committing the offence. (See page 44)

15. If the above recommendations are not adopted to apply Canadian criminal law to everyone on Canadian ships, then sections 154, 240.2 and 243 of the *Criminal Code* should be amended to make them applicable outside Canada. (See page 44)

16. Define "Canadian ship" in the *Criminal Code* by reference to the definition of it in section 2 of the *Canada Shipping Act*. (See page 44)

17. Repeal subsection 683(2) of the *Canada Shipping Act* that confers jurisdiction on courts in Commonwealth countries over offences by *British subjects* that occur on Canadian ships. (See page 45)

18. Provide in the *Criminal Code* General Part that Canadian criminal law be applicable to, and Canadian courts have jurisdiction over, extraterritorial onshore offences by crew members of Canadian ships, but not over offences by persons who were *former* crew members when they committed them. Amend section 684 of the *Canada Shipping Act* accordingly. (See page 46)

19. Provide that subsection 682(1) of the *Canada Shipping Act* and subsection 433(1) of the *Criminal Code* be examined by the Departments of Justice and Transport for duplicity and inconsistency. (See page 48)

20. Provide in the *Criminal Code* that the consent of the Attorney General of Canada be required to prosecute a person for an offence in or by a non-Canadian ship outside Canada. (See page 49)

21. Amend subsection BI-6(4) of the *Maritime Code* to state clearly what is intended and to describe accurately the jurisdiction of the authorities of the port-state over Canadian ships in foreign ports. (See page 51)

22. Amend subsection BI-4(2) of the *Maritime Code* so that it does *not* say that only *some* of our criminal law applies to foreign ships in passage through the territorial sea of Canada, but will say that *enforcement* of our criminal law will only be undertaken in the circumstances mentioned in that subsection. (See page 51)

23. Provide in the *Criminal Code* (rather than in the *Maritime Code*) unequivocally that the criminal law of Canada be applicable to all Canadian ships and all persons on board them wherever they may be. (See Recommendations 13 and 14 and page 52).

G. Aircraft

24. Delete paragraph 6(1)(*b*) from the *Criminal Code* as it does not seem justifiable under customary or conventional international law [or amend it to apply to Canadian citizens only]. (See page 56)

25. Delete subparagraph 6(1)(*a*)(ii) from the *Criminal Code*. (See page 57)

26. Amend section 76.1 of the *Criminal Code* to create the clear offence of hijacking that Canada is obligated to do as a party to the *Hague Convention* of 16 December 1970. (See page 58)

27. In the *Criminal Code* create separate offence(s) of items (*a*) through (*d*) of section 76.1 of the *Code*. (See page 58)

28. Provide in the *Criminal Code* for an offence of any act of violence against passengers or crew of an aircraft in flight in connection with the offence of hijacking, and thereby implement Article 4(1) of the *Hague Convention*. (See page 60)

29. Amend the *Criminal Code* subsection 6(1.1) to provide the several bases of trial jurisdiction prescribed in Article 4(1) of the *Hague Convention*. (See page 60)

30. To implement Article 1(1) of the *Montreal Convention* of 23 September 1971, amend subsection 6(1.1) of the *Criminal Code* to limit the extraterritorial applicability of section 76.2 of the *Criminal Code* to things done *intentionally*. (See page 62)

31. Amend subsection 6(1.1) of the *Criminal Code* to provide for the applicability of Canadian criminal law (to the offences proscribed in the *Montreal Convention*) in accordance with *all* the criteria prescribed in the *Montreal Convention*. (See page 63)

32. As an interim measure pending a new *Criminal Code* :

(a) amend paragraph 432(*d*) of the *Criminal Code* to make it apply to offences committed in Canada or offences deemed to have been committed in Canada;

(b) amend subsections 6(1) and (3) of the *Criminal Code* to make them apply to offences committed outside Canada only; and

(c) specify in subsection 6(3) that it confers jurisdiction in addition to paragraph 432(*d*). (See page 67)

III. Status of Accused

A. Public Servants

33. Delete the reference to the *Public Service Employment Act* from subsection 6(2) of the *Criminal Code* and thereby make the subsection applicable

to all federal public servants serving abroad. (See Recommendations 34 and 61 and page 69)

34. Provide in the *Criminal Code* that, apart from employees of the Government of Canada who are Canadian citizens or who otherwise owe allegiance to Canada, only employees who commit offences on federal government property, or against the security of Canada, or in the course or within the scope of their employment, are subject to Canadian criminal law and may be tried by Canadian courts for offences committed while on Canadian government service outside Canada. (See page 70)

B. Armed Forces

35. Mention in the *Criminal Code* the large class of people to whom the criminal law of Canada is generally applicable outside Canada, namely persons subject to the *National Defence Act*'s Code of Service Discipline including, among others, members of the armed forces, members of civilian components and dependants of those members accompanying members on duty abroad and the jurisdiction of Canadian civil and military courts over them pursuant to the *National Defence Act*. (See page 71)

C. Royal Canadian Mounted Police

36. Provide in the *Criminal Code* that members of the R.C.M.P. (and members of their households accompanying them) on service outside Canada be subject to Canadian criminal law in respect of their conduct there — at least to the extent of their diplomatic immunity from criminal prosecution by the host state. (See page 72)

D. Canadian Citizens

37. Provide in the General Part of the *Criminal Code* that courts in Canada have jurisdiction to try Canadian citizens for the offences of bigamy (paragraph 254(1)(*b*)) and treason (paragraph 46(3)(*a*)) when committed outside Canada. (See page 75)

38. Amend federal extraterritorial criminal law enactments such as the *Official Secrets Act* and *Foreign Enlistment Act* to provide uniformity of language and accuracy of terminology, for example, "Canadian citizen" rather than "Canadian national." (See page 76)

39. Provide in the General Part of the *Criminal Code* that courts in Canada have jurisdiction to try anyone for offences under sections 58 and 59 of it concerning passports and certificates of Canadian citizenship when committed outside Canada. (See page 79)

40. Provide in the *Criminal Code* that anyone who makes or utters counterfeit Canadian currency inside or outside Canada commits an offence for which he may be tried by courts in Canada. (See page 80)

IV. Extraterritorial Offences

A. Piracy

41. The Departments of Justice and External Affairs should examine sections 75, 76, 76.1 and 76.2 of the *Criminal Code* with a view to defining "piracy" more precisely. (See page 81)

42. Provide in the *Criminal Code* General Part that courts in Canada have jurisdiction to try anyone for piracy and other piratical offences committed outside Canada. (See page 82)

B. War Crimes

43. The Government of Canada should authorize an in-depth study of the subject "war crimes" with a view to drafting legislation to replace the outdated 1946 *War Crimes Act*. (See page 86)

C. Genocide

44. A study should be made to determine what amendments need be made in the *Criminal Code* to implement the 1948 *Genocide Convention*. (See page 90)

D. Slavery

45. The Departments of Justice and External Affairs and the Ministry of the Solicitor General should examine those international Conventions on this subject that are binding on Canada, and the existing Canadian law, to determine whether the non-applicability of British legislation under section 8 of the *Criminal Code* has resulted in there now being no implementing legislation applicable to Canada, and whether new legislation is required. (See page 92)

E. Hostage Taking

46. Provide in the *Criminal Code* for Canadian courts to exercise jurisdiction (over hostage taking offences outside Canada) as prescribed in the 1979 United Nations *International Convention against the Taking of Hostages* — that is, amend draft subsection 6(1.3) of the *Criminal Code* as it appears in the proposed *Criminal Law Reform Act, 1984* (*Bill C-19*). (See page 95)

F. Protection of Nuclear Material

47. If draft subsections 6(1.5) and (1.6) of the *Criminal Code* as suggested in the draft *Criminal Law Reform Act, 1984* are enacted, they should not deal with the offence of conspiracy. (See page 97)

48. Define nuclear material physical protection offences in the Special Part of the *Criminal Code*, and prescribe the jurisdiction of courts over them in the General Part (rather than combining these two things as appears in draft subsections 6(1.4), (1.5), (1.6) and (1.7) of the *Criminal Code* as proposed in *Bill C-19*, the *Criminal Law Reform Act, 1984*). (See page 97)

V. Transnational Offences

49. Provide in the General Part :

(a) that an offence is committed in Canada when it is committed in whole or in part in Canada, and

(b) that it is committed "in part in Canada" when,

- **(i) some of its constituent elements occurred outside Canada and at least one of them occurred in Canada, and a constituent element that occurred in Canada established a real and substantial link between the offence and Canada, or**
- **(ii) all of its constituent elements occurred outside Canada, but direct substantial harmful effects were intentionally or knowingly caused in Canada.** (See page 105)

50. Provide in the General Part that where an act occurs *in* Canada, if its harmful consequences are designed to occur, or are likely to occur, or do in fact occur only in another state or states *which does (do) not prohibit the act by its criminal law*, the act *in* Canada that causes such consequences, even though it constituted a criminal act in Canada, shall not be prosecuted in Canada. (See page 108)

Alternative 50. Alternatively we would recommend that where a criminal act occurs *in* Canada, the harmful effects of which are designed to occur or are likely to occur or do in fact occur in another state and no substantial harmful effects are felt in Canada, the offence *may be prosecuted in Canada but* that an accused shall *not be convicted* of that offence *if* he proves that his conduct did not amount to an offence under the criminal law of the state in which the harmful effects were designed to occur, or were likely to occur, or did in fact occur. (See page 108)

51. Provide in the General Part of the *Criminal Code* that where an act occurs *outside* Canada that constitutes an offence under Canadian law, *but not under the law of the state where it occurred*, a person shall not be [convicted by a Canadian court] [prosecuted in a Canadian court] for it unless harmful consequences were knowingly or intentionally thereby produced in Canada by that person. (See page 109)

52. Provide in the General Part, for omissions in Canada and outside Canada, in the same way as we have recommended in respect of *acts* in Canada and outside Canada in Recommendations 50 and 51. (See page 110)

VI. Inchoate Offences

A. Conspiracies

53. Consider whether a provision should be inserted in the *Criminal Code* to provide that a conspiracy in Canada to commit outside Canada one of certain

particularly heinous offences would constitute a crime of conspiracy in Canada regardless how they may be regarded elsewhere. (See page 114)

54. Delete subsections 423(4), (5) and (6) of the *Criminal Code* and provide in the General Part that Canadian courts have jurisdiction to try conspiracies committed outside Canada that have as their object an act or omission in Canada that is an indictable (serious) *offence* [under the federal law of Canada] if an overt act in furtherance of the conspiracy has been performed in Canada; provided that an overt act is not required in respect of certain offences to be prescribed by Parliament such as the unlawful importation of drugs into Canada. (See page 117)

B. Attempts

55. Provide in the *Criminal Code* that it is an offence to attempt in Canada to commit in another country an act or omission that is an offence under the law of both countries. (See page 120)

56. Provide in the *Criminal Code* that it is an offence to attempt outside Canada to commit a crime if

(a) the crime attempted was an extraterritorial offence under Canadian federal legislation, or

(b) all the following conditions are met :

(i) it was an attempt outside Canada knowingly to do something in Canada,

(ii) that that "something" would constitute an offence under Canadian federal law and a criminal offence under the law of the place where the attempt took place, and

(iii) some overt act in [connection with] [furtherance of] the attempt occurred in Canada, unless the attempt was to commit in Canada an offence inherently harmful to Canadian society — such as unlawful importation of drugs to be specified by Parliament as an exception to the "overt act" requirement. (See page 120)

C. Counselling, Inciting or Procuring

57. Subject to the same conditions as we have recommended in Recommendations 55 and 56 for attempts, we recommend that the *Criminal Code* make it an offence to counsel, incite or procure, inside or outside Canada a crime that is not completed. (See page 121)

58. Provide in the *Criminal Code* that anyone who counsels or procures the commission of an offence that is subsequently committed, is liable, under section 22 of the *Criminal Code*, *as a party to the offence* if the counselling or procuring was done outside Canada or in Canada for (a) the commission in Canada of an offence, or (b) the commission outside Canada of an extraterritorial offence under Canadian federal legislation, for example, passport forgery under section 58 of the *Criminal Code*. (See page 122)

59. Provide in the *Criminal Code* that it be an offence to be an accessory after the fact by having received, comforted or assisted a person outside Canada who has committed an offence inside or outside Canada which is punishable under Canadian federal legislation, *if* the accessory had offered or agreed, *prior* to the commission of the substantive offence, to assist any perpetrator of the substantive offence after the commission of the offence. (See page 122)

VII. Miscellaneous Matters

A. Diplomatic Immunity

60. Mention in the General Part of the *Criminal Code* all the classes of persons who are immune from the criminal jurisdiction of Canadian courts, and also mention the statutes that confer the immunity. (See page 125)

61. Provide in the General Part of the *Criminal Code* that members of the household of federal public servants outside Canada who are immune from local foreign criminal jurisdiction under the *Vienna Conventions*, be subject to Canadian criminal law and to prosecution in Canada for indictable offences committed in the host state under the same conditions as is the public servant concerned. (See Recommendations 33 and 34 and page 125)

B. Canadian Forces outside Canada

62. The Government of Canada should consider whether to repeal section 121 of the *National Defence Act* (pursuant to which persons subject to the Code of Service Discipline under the *National Defence Act* may be tried by Canadian courts using Canadian procedures for offences under foreign law), and, if so, whether to replace the foreign law offences with offences against the laws of the provinces of Canada. (See page 134)

C. Extradition and Rendition

63. Amend the *Extradition Act* and *Fugitive Offenders Act* to provide for uniformity of treatment of persons under both Acts. (See page 137)

D. Double Jeopardy

64. Provide in the *Criminal Code* that a plea of *autrefois convict* or *autrefois acquit*, based on a previous trial in a state other than Canada, for an offence substantially similar to the one in respect of which the plea is made, be treated by Canadian courts as though the plea were based on a trial in a Canadian court [unless, in the case of a previous acquittal, it resulted from a substantive or procedural defence not available under Canadian law]. (See page 139)

65. The subject of double jeopardy, in respect of persons being tried by Canadian courts for offences for which they have already been tried by foreign courts, should be dealt with in the General Part of the *Criminal Code* to apply to all such offences; subsections 6(4) and 423(6) should consequentially be repealed. (See page 140)

VIII. Jurisdiction Provisions of the *Criminal Code* — Reformulation

66. Delete the words "in Canada" or "outside Canada" or words similar thereto, from all the offence-creating provisions of the *Criminal Code* so that there would be no express or implied territorial limitation on *their applicability*; specify in the General Part what offence-creating provisions have extraterritorial applicability; and in the General Part confer jurisdiction on Canadian courts to try the specified extraterritorial offences. (See page 145)

67. Expressly provide in the General Part of the *Criminal Code* that, unless otherwise provided, the offence-creating sections of the *Code* are limited to conduct in Canada; such a statement would codify the common law presumption that "when Parliament creates an offence ... it does not intend it to apply to any act done by anyone in any ... other [country]." (See page 145)

CHAPTER EIGHTEEN

Draft Legislation

To implement the recommendations made in this Paper, we offer draft legislative provisions for inclusion in :

the General Part of a new *Criminal Code* as shown in Section I of this chapter;

the Special Part of a new *Criminal Code* as shown in Section II of this chapter;

other Acts of the Parliament of Canada as shown in Section III of this chapter; and

the General Part of the present *Criminal Code* as shown in Section IV of this chapter (pending the enactment of a new *Criminal Code*).

The draft provisions are worded on the premise that several expressions used in them will be legislatively defined in the General Part of the *Criminal Code*, or in the *Interpretation Act*, as follows :

— "Arctic waters" means the waters described in subsection 3(1) of the *Arctic Waters Pollution Prevention Act* (R.S.C. 1970, 1st Supp., c. 2);

— "Canada" includes the Canadian Arctic, the internal waters and territorial sea of Canada, and the airspace above the territory, internal waters, and the territorial sea of Canada, [Canadian ships and Canadian aircraft];

— "Canadian aircraft" means an aircraft registered in Canada under the *Aeronautics Act*;

— "Canadian court" means ... [Definition is contingent upon the results of an analysis of the court structure being undertaken currently by the Law Reform Commission of Canada];

— "Canadian ship" means a [ship] [vessel] registered in Canada under the *Canada Shipping Act*, or a vessel of the Canadian Forces;

- "exclusive economic zone of Canada" means the exclusive economic zone as defined in Article 55 of the *United Nations Convention on the Law of the Sea*, 1982 in respect of which Canada is the coastal state;
- "fishing zones of Canada" means the fishing zones of Canada as defined in section 4 of the *Territorial Sea and Fishing Zones Act* (R.S.C. 1970, c. T-6) as amended;
- "internal waters of Canada" include any areas of the sea that are on the landward side of the baselines of the territorial sea of Canada;
- "offence" means an offence created by this Act or any other Act of the Parliament of Canada; and
- "territorial sea of Canada" means the territorial sea of Canada as defined in section 3 of the *Territorial Sea and Fishing Zones Act* (R.S.C. 1970, c. T-6).

I. Draft Legislation for a New *Criminal Code* — General Part

FOREWORD

Under international law, Canada as a sovereign state may authorize its courts to try and punish :

(a) any person who commits an offence in whole or in part in the territory, territorial sea or airspace of Canada (the territorial principle);

(b) any person who is a Canadian citizen or who owes allegiance to Her Majesty in right of Canada and who commits an offence anywhere in or outside Canada (the nationality principle);

(c) any person who commits an offence anywhere against the security, territorial integrity or political independence of Canada including counterfeiting its seals, instruments of credit, currency, passports and stamps (the protective principle);

(d) any person who commits an offence anywhere on a ship registered in Canada or an aircraft registered in Canada [practical principle];

(e) any person who commits a universal crime such as piracy [or a war crime] (universality principle);

(f) any alien who commits an offence against a Canadian citizen in a place outside Canada where no other state has criminal jurisdiction or, where another state has criminal jurisdiction which that state does not exercise (passive personality principle).

The ambit of Canadian criminal law and criminal jurisdiction of Canadian courts has historically been based on the territorial principle; only exceptionally did Parliament exercise its power under international law and the Canadian constitution to create extraterritorial offences, for example : treason by Canadian citizens (nationality principle), Canadian passport offences (protective principle), piracy (universal principle), offences on ships and aircraft registered in Canada (practical principle). By and large, most offences committed outside Canada, whether by Canadian citizens or aliens, [such as homicides, assaults, thefts, frauds, criminal negligence] were not covered by the criminal law of Canada and did not come within the jurisdiction of Canadian courts.

This Code does not differ fundamentally from its predecessors as far as the extraterritorial applicability of its offence-creating provisions is concerned and the jurisdiction of Canadian courts is concerned. However, it does differ in form from its predecessors in its presentation of those matters. The general rule of territoriality — both as to the applicability of our criminal law and the criminal jurisdiction of Canadian courts — is now expressly stated in the General Part. Furthermore, the General Part now also specifies the exceptions to the territorial limitation by stating which offence-creating provisions apply outside Canada, and what courts in Canada have extraterritorial jurisdiction to try them. This form of presentation leaves the Special Part free to deal with the definition of offences without being complicated by extraterritorial concerns.

Applicability of Law

1. Offence-creating provisions of this [Act] [Code] and other Acts of the Parliament of Canada are only applicable to conduct anywhere in Canada unless otherwise expressly provided or the context clearly otherwise requires.

2. The offence-creating provisions of this [Act] [Code] and other Acts of the Parliament of Canada are applicable outside Canada to the same extent and under the same conditions that persons may be tried for contraventions of them pursuant to section 7.

Jurisdiction

3. Subject to diplomatic or other immunity under the law, Canadian courts have jurisdiction to try any person for any offence committed in whole or in part in Canada.

4. An offence is committed in part in Canada when

(*a*) any constituent element of the offence occurs in Canada and any constituent element of it occurs outside Canada, and a constituent element that occurs in Canada establishes a real and substantial link between the offence and Canada, or

(*b*) all of its constituent elements occur outside Canada, but direct, substantial harmful effects are thereby caused to occur in Canada.

5. No person shall be convicted by a Canadian court of an offence for having performed or omitted to perform an act in Canada that causes harmful effects in another state or states but not in Canada, if

(*a*) the harmful effects of the act or omission were designed or intended only to occur [or only to be felt], or were likely only to occur [or only to be felt] in another state or states; and

(*b*) the act or omission, if it had occurred in that other state or states, would not have constituted, or the harmful effects do not constitute [an] [a criminal] offence against the law of that state or one of those states.

6. No person shall be convicted by a Canadian court of an offence for only having performed or omitted to perform an act in a state other than Canada that caused harmful consequences to be felt or to occur in Canada, unless (a) the harmful consequences were direct and substantial, and (b) that that act or omission was an offence under the laws of Canada and the other state, or, if it was not an offence under the law of the other state, that the person intentionally caused the harmful consequences to occur or to be felt in Canada.

7. [Subject to this Act and any other Act of the Parliament of Canada,] Canadian courts have jurisdiction to try persons for offences committed *outside* Canada as follows :

(*a*) any person on a charge of having committed an offence

(i) against an internationally protected person under sections ...,

(ii) against section [58] of forging a Canadian passport or uttering a forged Canadian passport,

(iii) against section [59] of fraudulently using a certificate of Canadian citizenship,

(iv) against section [76] of piratical acts on or in respect of Canadian ships,

(v) against section [76.1] of hijacking an aircraft and any offence against section [76.1] or [76.2] on or in respect of aircraft if

(A) the aircraft involved lands in Canada with the offender on board,

(B) the alleged offender is, after the commission of the offence, present in Canada and is not extradited from Canada pursuant to provisions of relevant treaties to which Canada is a party, or

(C) the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in Canada,

(vi) against Part [X] in respect of Canadian currency,

(vii) against section 24 of "attempt," or against section 422 of "counselling, procuring, or inciting," or against subsection 423(1) of "conspiracy" if an overt act in furtherance thereof has been performed or occurred in Canada, except that an overt act in Canada is not required for the purposes of this subparagraph in respect of any offence intended unlawfully to import drugs into Canada,

(viii) against section 247.1 (hostage taking) if

(A) the alleged offender is a Canadian citizen, or is not a citizen of any state and ordinarily resides in Canada,

(B) the act or omission that constitutes the offence is committed with intent to induce Her Majesty in right of Canada or of a province to commit or cause to be committed any act or omission,

(C) a person taken hostage in the commission of the offence is a Canadian citizen, or

(D) the alleged offender is, after the commission of the offence, present in Canada and is not extradited from Canada pursuant to provisions of relevant treaties to which Canada is a party, or

(ix) against section ... (protection of nuclear material) if the alleged offender is a Canadian citizen or is, after the commission of the offence, present in Canada and is not extradited from Canada pursuant to provisions of relevant treaties to which Canada is a party;

(*b*) any person on a charge of having committed an offence against any Act of the Parliament of Canada in respect of which offence Canadian courts are given extraterritorial jurisdiction over him by or under this [Act] [Code] or any other Act of the Parliament of Canada;

(*c*) any person on a charge of having committed

(i) any offence on board a Canadian aircraft anywhere,

(ii) any offence on board a Canadian ship anywhere,

(iii) any offence in any fishing zone of Canada, exclusive economic zone of Canada or Canadian arctic waters that was

(A) an offence against an Act of the Parliament of Canada [specifically] applicable to activities in the zone or area of waters concerned, or

(B) any offence against any Act of the Parliament of Canada, if either the offender or the victim was at the time [engaged in] [there in connection with] activities over which Canada has sovereign rights under international law,

(iv) any offence on or within [one nautical mile] [500 metres] of any artificial island, installation or structure that is situated

(A) on or over the continental shelf of Canada,

(B) in a fishing zone of Canada or exclusive economic zone of Canada, or

(C) in or on the high seas and under the administration and control of the Crown in right of Canada or a Province of Canada, [other than on a ship of non-Canadian registry], if either the accused or the victim was at the time of the offence [engaged in] [there in connection with] activities over which Canada has sovereign rights under international law,

(v) the offence of piracy outside the territory or territorial waters of any state;

(*d*) a Canadian citizen or any other person owing allegiance to Her Majesty in right of Canada charged with having committed

(i) treason under section [46] anywhere,

(ii) bigamy (section 254),

(iii) hostage taking (section ...), or

(iv) an offence involving nuclear material (section ...);

(*e*) an employee of the Government of Canada or a member of the Royal Canadian Mounted Police force serving outside Canada, or a member of his or her household accompanying the employee or the member of the force on service outside Canada on a charge of having committed an [indictable] offence

(i) on property owned or occupied by the [Government of Canada] [Crown in right of Canada],

(ii) against the security or property of the Crown in right of Canada,

(iii) while he owed allegiance to [Canada] [Her Majesty the Queen in right of Canada],

(iv) while he is a citizen of Canada, or

(v) (by the employee or member of the force) in the course of his employment,

provided that if the conduct that constitutes the offence under Canadian law was committed in another state, the conduct also constitutes an offence under the law of the other state, and provided further that, if the offender is other than an employee or member of the force, the offender is not a national of or ordinarily resident in that state;

(*f*) a member of the Canadian Forces or other person to the extent provided in the *National Defence Act* on a charge of having committed any offence under that Act or any other Act of the Parliament of Canada; and

(*g*) a member of a crew of a Canadian ship to the extent provided in the *Canada Shipping Act* on a charge of having committed any offence ashore.

Attempts outside Canada

8. A person shall not be convicted by a Canadian court for an attempt outside Canada unless

(*a*) that person did it

(i) for the purpose of achieving an effect or a result in Canada that would constitute a substantive offence [in Canada], [under the criminal law of Canada], or

(ii) knowing that if the attempt were successful an offence under Canadian law would be committed in Canada; and

(*b*) a successful completion of the attempt would have [resulted in] [constituted] an offence under the law of the place where the attempt was made.

Attempts inside Canada to Commit an Offence outside Canada

9. A person shall not be convicted by a Canadian court for an attempt inside Canada to commit an offence under Canadian law in another state unless a successful completion of the attempt would have [resulted in] [constituted] an offence under the law of that state.

Accessory after the Fact

10. A person shall not be convicted by a Canadian court as an accessory after the fact in respect of the conduct of that person outside Canada unless, prior to the committing of the substantive offence, that person agreed or offered to assist a substantive offender after the offence would have been committed.

Venue of Courts over Extraterritorial Offences

11. Where a person is alleged to have committed an act or omission that is an offence over which Canadian courts have jurisdiction under section 7, the accused may be tried and, if found guilty, punished for that offence by the court having jurisdiction in respect of similar offences in the territorial division where the accused is [found] [present] in the same manner as if the offence had been committed in that territorial division.

Consent of Attorney General of Canada

12. A person who is not a Canadian citizen shall not be prosecuted in Canada for an offence [against this Code] alleged to have been committed outside Canada [and in respect of which Canadian courts have jurisdiction] unless the Attorney General of Canada consents to the prosecution.

13. In respect of an indictable offence alleged to have been committed in [or by] a ship [of non-Canadian registry] [registered in a state other than Canada], no proceedings shall be instituted without the consent of the Attorney General of Canada.

Double Jeopardy

14. [(1) Subject to subsection (2)] [A][a] plea of *autrefois convict* or *autrefois acquit* based on a previous trial in a state other than Canada, shall be treated by Canadian courts as though the plea were based on a trial in a Canadian court if the Canadian offence charged is substantially similar to the offence of which the accused was convicted in the other state.

[(2) A plea of *autrefois acquit*, based on a previous trial in a state other than

Canada, shall not be treated by Canadian courts as though the plea were based on a trial in a Canadian court unless the acquittal resulted from a substantive or procedural defence available under Canadian law.]

Immunity from Prosecution

15. Nothing in this Code affects the privileges and immunities of Her Majesty or foreign sovereigns or privileges and immunities of persons under the *Diplomatic and Consular Privileges and Immunities Act* (S.C. 1976-1977, c.31), *The Privileges and Immunities (NATO) Act* (R.S.C. 1970, c. P-23), *The Privileges and Immunities (International Organizations) Act* (R.S.C. 1970, c. P-22), *The Visiting Forces Act* (R.S.C. 1970, c. V-6) and any other Act of the *Parliament of Canada*.

16. In any criminal proceedings, a chart, issued by or under the authority of the Minister of Energy, Mines and Resources pursuant to section 6 of the *Territorial Sea and Fishing Zones Act* delineating the territorial sea of Canada, is [conclusive] proof of the delineation.

17. In any criminal proceedings, in the absence of a chart delineating the territorial sea of Canada having been issued under section 6 of the *Territorial Sea and Fishing Zones Act*, a declaration, by or under the authority of the Secretary of State for External Affairs as to whether or not a particular place is within the territorial sea of Canada, is [conclusive] proof of that fact.

II. Draft Legislation for a New *Criminal Code* — Special Part

— Delete section 76.1 and substitute therefor :

(1) Everyone on board an aircraft in flight who, unlawfully, by force or threat thereof, or by any other form of intimidation, seizes or exercises control of the aircraft is guilty of an indictable offence and is liable to imprisonment for life.

(2) Everyone on board an aircraft who commits any act of violence against a passenger or member of the crew of the aircraft in connection with an offence of hijacking is guilty of an indictable offence and is liable to imprisonment for X years.

- In section 76.2, the first line, after the word "who," insert the word "intentionally."

- Amend section 423 by deleting from paragraph 1(*a*) the words "whether in Canada or not," and by deleting subsections (4), (5) and (6).

- Amend paragraph 432(*d*) by inserting, in the first line after the word "committed," the words "in Canada."

- Delete subsection (2) of section 433 *Offences on Territorial Sea and Waters off the Coast* and substitute therefor :

> (2) In respect of an indictable offence to which subsection (1) applies, alleged to have been committed in a ship registered in a state other than Canada, no proceedings shall be instituted without the consent of the Attorney General of Canada.

III. Draft Legislation for Acts Other than the *Criminal Code*

A. *National Defence Act*

- In paragraph 120(1)(*b*) after the words "Parliament of Canada" insert the words "or any Act of the Legislature of the Province in which is situated the accused's place of ordinary residence under the *Canada Elections Act*."

- Delete section 121.

B. *Canada Shipping Act*

- Delete subsections 683(1) and (2). In section 684 delete the words "or within three months previously has been."

C. *Territorial Sea and Fishing Zones Act*

— Delete subsection (1) of section 3 and substitute therefor :

> **3.** (1) Subject to any exceptions under section 5, the territorial sea of Canada comprises those areas of the sea having, as their inner limits the baselines described in section 5 and, as their outer limits, lines drawn parallel to and equidistant from such baselines so that each point on the outer limits is distant twelve nautical miles seaward from the nearest point of the nearest baseline.

D. *Maritime Code*

— In section BI-6 delete subsection (4) and substitute therefor :

> (4) Where an offence is committed on board a Canadian ship within the waters of a foreign state and the master or owner of the ship, or the diplomatic representative of Canada in that state requests the intervention of a police authority in that state, the laws of that state may be enforced with respect to the ship and the persons on board it to the extent necessary to enable the request to be complied with.

IV. Interim Amendments to the *Criminal Code* — General Part

— Delete subsection 6(1) and substitute therefor :

> (1) Notwithstanding anything in this Act or any other Act, every one who on or in respect of an aircraft registered in Canada under regulations made under the *Aeronautics Act* commits an act or omission outside Canada that if committed in Canada would be an offence punishable by indictment shall be deemed to have committed that act or omission in Canada.

— In subsection 6(1.1) delete the last two lines and substitute therefor :

> ... shall be deemed to have committed that offence in Canada if :
>
> (*d*) the aircraft on board which the offence was committed lands in Canada with the alleged offender still on board,
>
> (*e*) the offence is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence in Canada, or
>
> (*f*) the alleged offender is present in Canada and Canada does not extradite him pursuant to Articles 4(2) and 8 of the 1970 *Hague Convention for the Suppression of Unlawful Seizure of Aircraft*, or Articles 5(2) and 8 of the 1971 *Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*.

— Amend section 6 by adding thereto the following subsection :

> (9) The jurisdiction of a court pursuant to subsection (3), to try [and punish] an act or omission that is an offence by virtue of subsections (1) and (1.1), is in addition to the special jurisdiction of the court pursuant to paragraph 432(*d*).

Endnotes

1. Exceptionally it is done; see, for example, section 121 of the *National Defence Act*, R.S.C. 1970, c. N-4. *Quaere* : whether paragraph 11(*g*) of the *Canadian Charter of Rights and Freedoms* may give people a *constitutional* right not to be convicted by a Canadian court for an offence under the law of a state other than Canada.

2. Glanville Williams, "Venue and the Ambit of Criminal Law," [1965] 81 *L.Q. Rev.* 276 at 282.

3. *British South Africa Co.* v. *Companhia de Mocambique*, [1893] A.C. 602 (H.L.) at 631.

4. R.S.C. 1970, c. S-9.

5. R.S.C. 1970, c. C-34.

6. R.S.C. 1970, c. N-4.

7. R.S.C. 1970, c. S-9.

8. R.S.C. 1970, c. O-3.

9. R.S.C. 1970, c. F-29.

10. R.S.C. 1970, c. G-3.

11. We do not propose to deal with the law of outer space which is the subject of ongoing consideration by the United Nations Committee on Outer Space, particularly by its legal subcommittee.

12. Macdonald, "The Relationship between International Law and Domestic Law in Canada" in *Canadian Perspectives on International Law and Organization*, Macdonald, Morris and Johnston, eds. (1974), p. 89.

13. For a detailed discussion on these principles see "Harvard Research Draft Convention on Jurisdiction with Respect to Crime" (1935), 29 *A.J.I.L.* 439; Akehurst, "Jurisdiction in International Law" (1974), 46 *Brit. Y. B. of Int'l L.* 145; Brownlie, *Principles of Public International Law*, 3rd ed. (1979), pp. 298-305; Williams and Castel, *Canadian Criminal Law, International and Transnational*

Aspects (1981), chapters 1 to 5; Blakesley, "United States Jurisdiction over Extraterritorial Crime" (1982), 73 *J. of Crim. L. and Criminology* 1109.

14. Blakesley, *supra*, note 13, p. 1136.

15. American Law Institute, *Model Penal Code*, paragraph 1.03(a).

16. See, for example : Brownlie, *supra*, note 13, p. 300 :

> ... there is the subjective application which creates jurisdiction over crimes commenced within the state but completed or consumated abroad ... (and) the objective territorial principle, according to which jurisdiction is founded when any constituent element of a crime is consummated on State territory.

See also Williams and Castel, *supra*, note 13, p. 29 :

> Under the objective territorial principle, a state has jurisdiction over a crime which is completed within its territory.

But compare Blakesley, *supra*, note 13, p. 1135 :

> The objective territorial theory provides for jurisdiction over crimes committed wholly outside the *forum* state's territory, when the effects or results of those crimes occur within the territory. The subjective territorial principle provides for jurisdiction over crimes in which a material element has occurred within the territory.

17. Although Dr. Michael Akehurst, in his extensive treatise on "Jurisdiction in International Law" (1974) (*supra*, note 13 at 154) submits "that jurisdiction can only be claimed by the state where the *primary effect* is felt," the drafters of a 1981 bill in the U.S. Senate (*Bill 1630*, subparagraph 204(*g*)(i) — *infra*, note 166) would permit federal U.S. Courts to exercise criminal jurisdiction based on "effects" in the United States if the harm or the threatened harm is "of the type sought to be prevented by the statute describing the offence." In a recent doctorial thesis at Columbia Law School (1982) Professor C. L. Blakesley establishes that "the objective territorial theory (the most frequently articulated basis for assertion of extraterritorial jurisdiction) has always required that a *significant adverse effect* occur within the asserting state's territory." (*Supra*, note 13, p. 1111.) The 1982 draft *Restatement of U.S. Foreign Relations Law*, Chapter 1 — "Jurisdiction," Section 402 reads :

> Subject to Section 403, a state may under international law exercise jurisdiction to prescribe and apply its law with respect to : (1) ...
>
> (c) conduct outside its territory which has, or which is intended to have, *substantial effect* within its territory. [Emphasis added]

In 1981 Professor Michael Hirst carefully examined "Jurisdiction over Cross-Frontier Offences" (1981), 97 *L.Q. Rev.* 80 particularly in the light of cases in English law. He notes that :

> it is a well-established principle of international law that the states concerned may exercise their territorial jurisdiction either *subjectively* or *objectively*; [(*i.e.* :)] either because the offender was physically present within their territory when committing the offence, or because the harmful effects of his conduct were felt there .... Most reported cases ... appear ... to favour an objective interpretation which deems an offence to be committed where the harmful results are *felt*. [Emphasis added]

18. For example, Federal Republic of Germany, France, Greece, Japan, Poland — as shown in *The American Series of Foreign Penal Codes* (Sweet & Maxwell Ltd.).

19. As to the relationship between the passive personality principle and the universality principle see Fitzgerald "The Territorial Principle in International Law; An Attempted Justification" (1970), 1 *Georgia J. of Int'l. and Comp. L.* 29, p. 41; Akehurst, *supra*, note 13, p. 163; and Brownlie, *supra*, note 13, p. 305. The passive personality principle — or "objective personality principle" or "passive nationality principle" as it is sometimes called, is probably only valid under international law in situations where none of the other principles would be applicable, for example a murder of a national of the state of the forum by an alien on an ice floe on the high seas.

20. *Supra*, note 17, 1982 draft *Restatement of Foreign Relations Law*, p. 92.

21. *Treacy* v. *D.P.P.*, [1971] A.C. 537 (H.L.) at 551 *per* Lord Reid.

22. Subsection 7(1) of the *Criminal Code* appears to be concerned with authorizing possible exemption of political divisions from the application of the *Code*'s provisions rather than limiting the application of the *Code* to Canadian as opposed to foreign territory. Subsection 5(2) of the *Criminal Code* deals with *convicting* a person, that is, the jurisdiction of courts in Canada, rather than the applicability of offence sections outside Canada.

23. Section 433 of the *Criminal Code*, does speak of the locus of offences but it is not an offence-creating section; it merely provides for the jurisdiction of courts to try any offence committed in the territorial sea of Canada.

24. *Minister of National Revenue* v. *LaFleur* (1964), 46 D.L.R. (2d) 439 at 443 (S.C.C.).

25. R.S.C. 1970, c. F-14.

26. R.S.C. 1970, c. C-21.

27. For a brief review of Canada's claim to sovereignty over the Canadian Arctic see Reid, "The Canadian Claim to Sovereignty over the Water of the Arctic" (1974), 12 *Can. Y. B. Int'l. L.* 111; as to the legal status of the Arctic Ocean, see Pharand, "The Arctic Waters in Relation to Canada" in *Canadian Perspectives on International Law and Organization*, *supra*, note 12, p. 434.

28. See respectively *R.* v. *Tootalik E 4-321* (1969), 71 W.W.R. 435, (1970) 74 W.W.R. 740 (Territorial Ct. N.W.T.); Green, "Comment : Canada and Arctic Sover-

eignty" (1970), 48 *Can. Bar Rev.* 740, p. 755; *U.S.* v. *Escamilla* (1974), 467 F. 2d. 341.

29. The legal status of various types of Arctic ice is examined in a recent paper by Susan B. Boyd at the University of London, entitled "The Legal Status of Arctic Ice — A Comparative Approach and a Proposal" to be published in the *Canadian Yearbook of International Law*.

30. *United Nations Convention on the Law of the Sea*, U.N. Doc. A/Conf. 62/122, October 7, 1982, signed by Canada December 10, 1982. In 1958, Canada had signed the 1958 *Geneva Convention on the Territorial Sea and Contiguous Zone*, but never ratified it. See *infra*, note 44.

31. R.S.C. 1970, c. T-7.

32. *The Franconia, The Queen* v. *Keyn* (1876), 2 Ex.D. 63. In discussing the relationship between international law and domestic law in Canada, Dean Ronald St J.Macdonald comments that Cockburn C.J., in the *Keyn* case, was saying that the international law rule gave sovereignty but not jurisdiction. The latter was for Parliament to give. (*Canadian Perspectives on International Law and Organization*, *supra*, note 12, p. 96.) Nor does the international law rule extend the applicability of national law over the territorial sea. That, of course, is also for Parliament.

33. As to jurisdiction over offences committed on vessels in ports, see page 39 of this Paper and *infra*, note 73. A coastal state's police powers to investigate crimes and make arrests on board ships in the territorial sea is not unrestricted : see, sections 1 and 2 of Article 19 of the 1958 *Geneva Convention on the Territorial Sea and Contiguous Zone* (*infra*, note 44) which read :

> 1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases :
>
> (a) If the consequences of the crime extend to the coastal State; or
>
> (b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or
>
> (c) If the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies; or
>
> (d) If it is necessary for the suppression of illicit traffic in narcotic drugs.
>
> 2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.

34. R.S.C. 1970, c. T-7.

35. R.S.C. 1970, c. T-7, s. 3.

36. R.S.C. 1970, c. T-7, s. 5(3).

37. See, for example, *Re Dominion Coal Co. Ltd. and County of Cape Breton* (1963), 40 D.L.R. (2d) 593 (N.S. S.C.A.D.).

38. [1927] P. 311 (C.A.).

39. See for example, *Chateau-Gai Wines Ltd. and Attorney General of Canada* (1970), 14 D.L.R. (3d) 411 (Ex.).

40. See the Law Commission (U.K.), *The Territorial and Extraterritorial Extent of the Criminal Law* (Report No. 91, 1978), p. 6, note 22.

41. See, for example, Law Reform Commission of Canada, *Theft and Fraud* [Working Paper 19] (1977).

42. See Akehurst, *supra*, note 13, p. 146; Hyde, *International Law*, 2nd ed. (1947), Vol. 1, p. 641, note 1; see remarks regarding the *NATO Status of Forces Agreement* in Chapter Thirteen of this Paper.

43. *Geneva Convention on the High Seas*, done at Geneva, 29 April 1958, U.N. Doc. A/Conf. 131/53, April 28, 1958; signed by Canada, April 29, 1958. B.T.S. 1963 No. 5, T.I.A.S. 5200 (not in C.T.S.), 450 U.N.T.S. 11.

44. *Convention on the Territorial Sea and the Contiguous Zone* done at Geneva, 29 April 1958; (signed by Canada, 29 April 1958; not ratified by Canada). UNTS 516/205, B.T.S. 1965/3, T.I.A.S. 5639, (not in C.T.S.).

45. See, for example, *Croft* v. *Dunphy*, [1933] A.C. 156 (P.C.).

46. R.S.C. 1970, c. C-40, s. 2.

47. *Supra*, note 30.

48. *Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas* done at Geneva 29 April 1958; U.N. Doc. A/Conf. 13/38 April 28, 1958; signed by Canada 29 April 1958; T.I.A.S. 5969, 559 U.N.T.S. 285.

49. R.S.C. 1970, c. T-7 and Orders in Council such as the Territorial Sea Geographical Coordinates Order C.R.C., Vol. XVIII, c. 1550, p. 13751.

50. R.S.C. 1970, c. F-14.

51. R.S.C. 1970, c. C-21.

52. R.S.C. 1970, c. F-16.

53. R.S.C. 1970, c. F-17.

54. R.S.C. 1970, c. F-18.

55. R.S.C. 1970, c. F-19.

56. R.S.C. 1970, c. F-14.

57. *Regina* v. *Vassallo* (1981), 131 D.L.R. (3d) 145 (P.E.I. C.A.).

58. *Supra*, note 30.

59. *Supra*, note 48.

60. *Supra*, note 30.

61. 21 October 1968, Essex Assizes (Unrep.). *Times*, Oct. 22, 1968. See also English Law Commission, *supra*, note 40 at 18.

62. *Geneva Convention on the Continental Shelf*, done at Geneva April 29, 1958; signed by Canada April 29, 1958, ratified by Canada effective March 8, 1970; 1970 C.T.S. No. 4.

63. *Supra*, note 30.

64. *Supra*, note 30.

65. R.S.C. 1970, c. O-4, as amended by R.S.C. 1970, 1st Supp. c. 30.

66. *Supra*, note 30.

67. R.S.C. 1970, 1st Supp., c. 2, s. 3.

68. Williams and Castel, *supra*, note 13, p. 33; there are very few areas in which this Commission is not in agreement with this most useful work that so comprehensively deals with the many aspects of the extraterritoriality of Canadian criminal law today.

69. *Supra*, note 43.

70. *Supra*, note 30.

71. (1927) P.C.I.J., Series A, No. 10.

72. English Law Commission, *supra*, note 40, p. 21.

73. *Supra*, note 68, p. 48 (footnotes not included); see also Brownlie, *supra*, note 13, pp. 316-319.

74. This right is often expressed in terms of the *jurisdiction of a state to prosecute and punish for crime* (See Articles 1(b) and 4 of the Second Draft *Convention of Jurisdiction with Respect to Crime* (1931), 29 *A.J.I.L.* 439 and comments relating

to those articles, pp. 509 to 515); in that context the word "jurisdiction" includes legislative as well as judicial power. As mentioned earlier, to avoid confusion we prefer to reserve the word "jurisdiction" *in this Paper* to mean the power of courts to try persons for criminal offences.

75. English Law Commission, *supra*, note 40, p. 21, footnote 88 and p. 22 :

> Quite apart from this section [686 of the *Merchant Shipping Act*] indictable offences committed on British ships on the high seas are covered by section 1 of the *Offences at Sea Act, 1799* and are punishable at common law.

See *R*. v. *Anderson* (1868), [L.R.] 1 C.C.R. 161.

76. English Law Commission, *supra*, note 40, p. 21, para. 54, and footnote 87; *Oteri* v. *The Queen*, [1976] 1 W.L.R. 1272, 1276 (P.C.).

77. R.S.C. 1970, c. S-9.

78. C.T.S. 1931, No. 7.

79. *British Nationality Act*, 1948.

80. The *Citizenship Act*, S.C. 1974-75-76, c. 108, which repealed and replaced the *Canadian Citizenship Act* (R.S.C. 1970, C-19), substantially affected the status of British subjects.

81. Paragraph 678(1)(*b*) of the *Canada Shipping Act* reads in part : "[T]he provisions of the *Criminal Code* relating to summary conviction apply to *all offences against this Act* other than...." [Emphasis added]

82. See Glanville Williams, *supra*, note 2, p. 410; and English Law Commission, *supra*, note 40, p. 22, para. 55.

83. [1981] 2 All E.R. 1098 (H.L.).

84. [1956] 2 All E.R. 86 (Cent. Crim. Ct.).

85. It should be noted that the rationale in the later British aircraft case of *R*. v. *Naylor*, [1961] 2 All E.R. 932 (Cent. Crim. Ct.), was that section 2 of the *Larceny Act, 1916*, under which the accused was charged in that case, was applicable *outside* England; hence, even where an offence under that section was committed on a British aircraft outside England, English courts had jurisdiction under subsection 62(1) of the *Civil Aviation Act 1949*, to try it. That case can therefore readily be distinguished from *R*. v. *Kelly* and *R*. v. *Martin* on the ground that in the latter two cases, the offence provision of the Act or Regulations respectively under which the accused was charged was held by the court *not* to be applicable outside England.

86. *Supra*, note 21, p. 551.

87. [1972] 2 All E.R. 471 (Q.B.).

88. The English Law Commission published Working Paper No. 29 (12 May 1970), p. 17, para. 20; English Law Commission, *supra*, note 40, p. 23, para. 57.

89. Law Commission, *supra*, note 40, p. 27, para. 66.

90. See *Gordon* v. *R. in Right of Canada*, [1980] 6 W.W.R. 519 (B.C. C.A.).

91. *Ibid.*, p. 523.

92. The Code of Service Discipline is made up of Parts IV through IX of the *National Defence Act*, R.S.C. 1970, c. N-4; see in particular, paragraphs 55(1)(*f*) and (4)(*d*), section 120 "Service Trial of Civil Offences" and section 121 "Offences out of Canada."

93. S.C. 1977-78, c. 41 (Not yet proclaimed in force).

94. Williams and Castel, *supra*, note 13, pp. 20 and 36.

95. *Supra*, note 32.

96. Williams and Castel, *supra*, note 13, p. 36.

97. *Ibid.*, pp. 49-53, extracts from which are quoted in the text of this Paper at pages 37 and 38.

98. (*Tokyo Convention*), 1970, C.T.S. No. 5.

99. (*Hague Convention*), 1972, C.T.S. No. 23.

100. (*Montreal Convention*), 1973, C.T.S. No. 6.

101. Subsection 205(2) of the *Air Regulations*, C.R.C. 1978, c. 2, reads in part :

> ... a person is qualified to be the registered owner of a Canadian aricraft if he is :
>
> (*a*) a Canadian citizen; or
> (*b*) a person lawfully admitted to Canada for permanent residence; or
> (*c*) a Corporation that is incorporated under the laws of Canada ....

102. *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs* (House of Commons) May 10, 1972, page 6 :9.

103. *Supra*, note 100.

104. (1978), 40 C.C.C. (2d) 353, [1978] 2 S.C.R. 1299.

105. "... we think that a man is 'found in' any place where he is actually present" — *per* Lord Campbell, *R.* v. *Sattler* (1858), 7 Cox. C.C. 431 (Ct. Crim. App.) at 441, quoted in : *Re Falkner and the Queen* (1977), 37 C.C.C. (2d) 330 (B.C. S.C.) at 335, and applied *Gordon* v. *R. in Right of Canada*, *supra*, note 90.

106. R.S.C. 1970, c. P-32.

107. See *Minutes of Proceedings and Evidence of House of Commons Standing Committee on Justice and Legal Affairs*, March 4, 1969, p. 167 where the then Minister of Justice, in answer to a question as to whether the expression "Public Service Employment Act" employee covered "all the civil servants, the ambassadors and so on?" answered : "*All* federal civil servants." [Emphasis added]

108. Order in Council, P.C. 1979-1997, 26 July 1979, SOR/79-545.

109. C.R.C., Vol. XIV, c. 1339, p. 10785.

110. R.S.C. 1970, c. N-4, s. 2 (definition of Code of Service Discipline), s. 55 and s. 120.

111. See the *Royal Canadian Mounted Police Act*, R.S.C. 1970, c. R-9, s. 40.

112. See, for example the Criminal Codes of the People's Republic of China, 1980, Articles 4 and 5; the Penal Code of the Polish People's Republic, Chapter XVI (as of May, 1969); the Turkish Criminal Code, Part I, sections 3, 4, 5 and 6 (as of June 1964); the Greek Penal Code, Articles 5 and 6 (as of August, 1950), *supra*, note18.

113. See Fitzgerald, *supra*, note 19.

114. At one time the bigamy offence-creating section (32 and 33 Vict., c. 20, s. 58) did provide for jurisdiction of courts in Canada as follows :

> Whosoever, being married, marries any other person during the life of the former husband or wife, whether the second marriage has taken place in Canada or elsewhere, is guilty of felony, and shall be liable to be imprisoned, & c.; and any such offence may be dealt with, enquired of, tried, determined and punished in any district, county or place in Canada where the offender is apprehended or is in custody, in the same manner in all respects as if the offence had been actually committed in that district, county or place.

See *Regina* v. *Pierce*, [1887] XIII O.R. 226 (Q.B.) at 228.

115. *Supra*, note 24, and page 13 of this Paper.

116. R.S.C. 1970, c. O-3.

117. R.S.C. 1970, c. F-29.

118. Hirst, "The Criminal Law Abroad," [1982] *Crim. L. Rev*. 496, p. 499 states :

> The common law, it will be recalled, was incapable of extraterritorial effect and even the jurisdiction over piracy, first developed by the Court of the Admiral, is now provided for by statute.

119. 1960 U.K.T.S. 1960 No. 5.

120. Williams and Castel, *supra*, note 13, p. 267.

121. *Ibid.*, p. 268.

122. The Criminal Codes of : the Federal Republic of Germany (current) section 6, item 7; Greece (1950) article 8(g); Italy (1930) article 7(3); People's Republic of China (1969) article 4, item 2 (se[illegible] *American Series of Foreign Penal Codes*, *supra*, note 18); *Exchange Contr*[illegible] *1947* (1947) (U.K.) subsection 1(1) 34, sch. 5, Part II, paras. 1 and 2.

123. See under the heading "II.C. Other Principles" in the "Introduction and Principles" Part of this Paper.

124. *Supra*, note 43.

125. *Supra*, note 30.

126. See *Cameron* v. *H.M. Advocate*, 1971 S.C. (J.C.) 50.

127. See *In re Piracy Jure Gentium*, [1934] A.C. 586 (P.C.).

128. F.M. 27-10 (1956).

129. S.C. 1946, c. 73.

130. R.S.C. 1970, c. G-3.

131. *Infra*, note 135, re *Interpretation Act*, para. 36(*h*).

132. *National Defence Act*, R.S.C. 1970, c. N-4, Part IX.

133. *Quaere* whether paragraph 11(*g*) of the *Canadian Charter of Rights and Freedoms* would protect a person from being convicted of a war crime that had retroactively been made an offence under a Canadian statute if, at the time of the commission of the offence, "it constituted an offence under ... international law or was criminal according to the general principles of law recognized by the community of nations."

134. A question arises as to the extent, if any, to which section 15 of the *Criminal Code* (obedience to *de facto* law) would be a defence to a charge of having committed a war crime.

135. It may be that by operation of paragraph 36(*h*) of the *Interpretation Act*, R.S.C. 1970, c. I-23, the *National Defence Act* (1950) and rules of procedure for trials by court martial under it would supercede the *British Army Act* and British Rules of Procedure in respect of trials of war criminals under the *War Crimes Act and Regulations* of 1946; but, in any event, obviously outdated legislation such as our 1946 *War Crimes Act* should be replaced as soon as possible.

136. The 1963 *Tokyo Convention* (1970 C.T.S. No. 5); the 1970 *Hague Convention* (1972 C.T.S. No. 23); the 1971 *Montreal Convention* (1973 C.T.S. No. 6).

137. *Geneva Conventions Act*, R.S.C. 1970, c. G-3.

138. (1974), 13 Int. L. Mat. 41.

139. 1949 C.T.S. No. 27.

140. See *Single Convention on Narcotic Drugs* and its amending protocol, 1961, C.T.S. 1964/30; U.N. Doc. E/Cont. 63/8, March 24, 1972.

141. 1928 C.T.S. No. 5. Slavery was dealt with by 5 Geo. IV, c. 113, ss. 9, 16 (Imp.).

142. 1910 B.T.S. 1912 No. 20, as amended by (1949) 98 U.N.T.S. 103.

143. United Nations, New York, 18 December 1979; signed by Canada in 1980.

144. United Nations, New York, 3 March 1980; signed by Canada in 1980.

145. See Chapter Five of this Paper.

146. See Chapter Eight of this Paper.

147. *Supra*, note 138.

148. *Supra*, note 139.

149. R.S.C. 1970, c. N-1.

150. R.S.C. 1970, c. F-27.

151. *Supra*, notes 141 and 142.

152. *Supra*, note 143.

153. *Supra*, note 144.

154. *Atomic Energy Control Act*, R.S.C. 1970, c. A-19.

155. See the Part of this Paper entitled "Introduction and Principles" and *supra*, note 17.

156. (1895), 1 C.C.C. 263 (B.C. C.A.).

157. [1965] 2 O.R. 168 (C.A.).

158. *Re Chapman*, [1970] 5 C.C.C. 46 (Ont. C.A.).

159. Hall, "Territorial Jurisdiction and the Criminal Law," [1972] *Crim. L. Rev.* 276, p. 276-277, and see Williams, *supra*, note 2, p. 518.

160. In its 1978 Report (*supra*, note 40, p. 3, paras. 7 and 8), the Law Commission withdrew this recommendation pending study of individual offences.

161. *Ibid.*

162. *Supra*, note 21, p. 537.

163. This includes any new "computer crimes" such as ones which have been created by recent legislation in the U.S.A. See Bender, *Computer Law : Evidence and Procedure* (1979), section 4.07, pages 4-71 and 4-72 where the *California Penal Code*, section 502, Calif. 1979, chapter 858 is quoted. Paragraphs (b), (c) and (d) of that section read :

> (b) Any person who intentionally accesses or causes to be accessed any computer system or computer network for the purpose of (1) devising or executing any scheme or artifice to defraud or extort or (2) obtaining money, property, or services with false or fraudulent intent, representations, or promises shall be guilty of a public offence.
>
> (c) Any person who maliciously accesses, alters, deletes, damages or destroys any computer system, computer network, computer program, or data shall be guilty of a public offence.
>
> (d) Any person who violates the provisions of subdivision (b) or (c) is guilty of a felony and is punishable by a fine not exceeding five thousand dollars ($5,000), or by imprisonment in the state prison for 16 months, or two or three years, or by both such fine and imprisonment, or by a fine not exceeding two thousand five hundred dollars ($2,500) or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

164. *Supra*, note 15, s. 103.

165. English Law Commission, *supra*, note 88, p. 14. In its 1978 Report of the same title, *supra*, note 40, that Commission made final recommendations on many matters dealt with in the Working Paper but did not deal finally with the transnational matters discussed here; it suggested (page 2 of the Report) that progress can be made (on this aspect of the territorial extent of the criminal law) in the context of individual offences. We advocate that the matter be addressed both generally *and* in respect of specific types of offences; for our comments on conspiracies, attempts, and so forth, see Chapter Eleven of this Paper.

166. Senate *Bill 1630* and House *Bill 1647* both of 97th Con., 1st Sess. (1981) : see W. A. Gillon, "Note" (1982), 12 *Georgia J. of Int'l. and Comp. L.* 305, pp. 314 and 315.

167. *Crimes Act, 1961*, s. 7 (N.Z.).

168. *Supra*, note 15.

169. *Supra*, note 40.

170. See *Re Chapman*, *supra*, note 158.

171. See *Board of Trade* v. *Owen*, [1957] A.C. 602 (H.L.).

172. *Supra*, note 15, s. 1.03(d).

173. *Board of Trade* v. *Owen*, *supra*, note 171, p. 633; Wright, *Law of Criminal Conspiracies and Agreements* (1887); Stephen, *A History of the Criminal Law of England*, vol. II (1883), pp. 13-14.

174. *D.P.P.* v. *Doot*, [1973] A.C. 807 at 833 (H.L.).

175. Minutes of the Senate Legal and Constitutional Affairs Committee, 25 Feb. 1976, Issue 31, page 31 :16.

176. *British Columbia Electric Railway Co. Ltd.* v. *The King*, [1946] A.C. 527 (P.C.) at 541; and see LaForest, "May the Provinces Legislate in Violation of International Law?" (1961), 39 *Can. Bar Rev.* 78, p. 87.

177. *U.S.* v. *Toscanino* (1974), 500 F. 2d 267 (U.S.C. App. 2nd Circ.); also Williams and Castel, *supra*, note 13, p. 147 : "The *Toscanino* case ... emphasizes that an accused may raise the question of violation of international law in the domestic courts."

178. Blakesley, *supra*, note 13 *passim*, but especially, p. 1160.

179. English Law Commission, *supra*, note 88, pp. 53 and 54, paras. 95 and 96.

180. Senate *Bill 1630* and House *Bill 1647*, *supra*, note 166.

181. *Supra*, note 15, s. 1.03(d).

182. English Law Commission, *supra*, note 88, pp. 55 and 56.

183. *Supra*, note 15, s. 1.03(b).

184. *Supra*, note 88, p. 56. The Law Commission did not deal with attempts in its Report (*supra*, note 40, p. 3, para. 8).

185. *Vienna Convention on Diplomatic Relations, 1961*, C.T.S. 1966, No. 29.

186. S.C. 1976-77, c. 31.

187. *Vienna Convention on Consular Relations, 1963*, C.T.S. 1974, No. 25.

188. *United Nations Convention on Privileges and Immunities* (forms the Schedule to the *Privileges and Immunities (International Organizations) Act*, R.S.C. 1970, c. P-22).

189. R.S.C. 1970, c. P-22.

190. R.S.C. 1970, c. N-4, s. 120(1)(*a*).

191. R.S.C. 1970, c. N-4, s. 60.

192. R.S.C. 1970, c. N-4, s. 61(1).

193. R.S.C. 1970, c. N-4, s. 56(1).

194. *In the Matter of a Reference as to whether Members of the Military or Naval Forces of the United States of America Are Exempt from Criminal Proceedings in Canadian Criminal Courts*, [1943] S.C.R. 483.

195. *Ibid.*, pp. 485 and 501.

196. *Ibid.*, p. 485.

197. *Visiting Forces Act*, R.S.C. 1970, c. V-6.

198. S.C. 1972, c. 13, s. 75.

199. *Visiting Forces Act*, R.S.C. 1970, c. V-6.

200. R.S.C. 1970, c. N-4, s. 120(1)(*a*).

201. *North Atlantic Treaty Status of Forces Agreement*, signed at London, June 19, 1951; C.T.S. 1953 No. 13.

202. *Ibid.*, Article VII(3)(a).

203. *Ibid.*, Article VII(3)(b).

204. *Ibid.*, Article VII(3)(c).

205. *Ibid.*, Article VII(8). Note that there is no prohibition against the military authorities of the sending state additionally trying the accused for violating rules of discipline.

206. *Exchange of Letters constituting an Agreement concerning the Status of the United Nations Peace-Keeping Force in Cyprus*, 492 U.N.T.S. 57, New York, 31 March, 1964.

207. *National Defence Act*, R.S.C. 1970, chap. N-4, s. 231 states :

> **231.** Where a person subject to the Code of Service Discipline does any act or

> omits to do anything while outside Canada which, if done or omitted in Canada by that person would be an offence punishable by a civil court, that offence is within the competence of, and may be tried and punished by, a civil court having jurisdiction in respect of such an offence in the place in Canada where that person is found in the same manner as if the offence had been committed in that place, or by any other court to which jurisdiction has been lawfully transferred. 1955, c. 28, s. 14; 1966-67, c. 96, s. 51.

208. *Cox* v. *Army Council*, [1963] A.C. 48 (H.L.).

209. R.S.C. 1970, c. N-4, s. 120(1)(*a*).

210. *Supra*, note 13, p. 143.

211. *Canada Elections Act*, R.S.C. 1970, 1 Supp., c. 14, schedule II, s. 27.

212. See *R.* v. *Walton* (1905), 10 C.C.C. 269 (Ont. C.A.) which held that, although the accused had been wrongfully arrested in Buffalo, N.Y. and brought to Canada against his will, the jurisdiction of Canadian courts to try him was not thereby impaired. The court of appeal based its decision on the English case of *Ex parte Scott*, 109 E.R. 166 (K.B.) and the United States case of *Kerr* v. *Illinois* (1886), 119 U.S. 436 (U.S. S.C.).

213. *Extradition Act*, R.S.C. 1970, c. E-21.

214. *Fugitive Offenders Act*, R.S.C. 1970 c. F-32; in this connection see O'Higgins, "Extradition within the Commonwealth" (1960), 9 *Int. and Comp. L.Q.* 486; for an extensive commentary on the Canadian law of extradition and rendition and its defects, see : G. V. LaForest, *Extradition to and from Canada*, 2nd ed. (1977), and Williams and Castel, *supra*, note 13, pp. 337-431.

215. *Interpretation Act*, R.S.C. 1970, c. I-23, s. 28.

216. Williams and Castel, *supra*, note 13, p. 343.

217. (1973), 14 C.C.C. (2d) 174 (Ont. H. Ct.) at 179; see also pp. 182 and 183.

218. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 6(4) and 423(6).

219. See *Burrows* v. *Jemino* (1726), 2 Str. 733, 93 E.R. 815 (K.B.); *R.* v. *Roche* (1775), 1 Leach 134, 168 E.R. 169 (K.B.); *R.* v. *Azzopurdi* (1843), 2 Mood 289, 169 E.R. 115 (K.B.). There does not appear to be any reported Canadian case.

220. *Criminal Code*, R.S.C. 1970, c. C-34, s. 538(1).

221. For a recent commentary on the case of *Brannson* v. *Minister of Employment and Immigration*, [1981] 2 F.C. 14, (1980) 34 N.R. 411 (F.C.A.), particularly as to whether a postal offence of which a person was convicted in the United States was one of which he could have been convicted under Canadian law if it had occurred in Canada, see Davis and White, "Comment" (1982), 60 *Can. Bar Rev.* 363.

222. Glanville Williams, *supra*, note 2, p. 538.

223. See subsections 6(4) and 423(6) of the *Criminal Code*. There are no similar provisions in the *Criminal Code* in respect of the other extraterritorial *Code* offences such as those under subsection 46(3), sections 58, 59, 75, and 76 and paragraph 254(1)(*b*).

224. *R.* v. *Roche*, *supra*, note 219; *R.* v. *Aughet* (1918), 13 Cr. Appl. R. 101.

225. *R.* v. *Sarazin and Sarazin* (1978), 39 C.C.C. (2d) 131 (P.E.I. S.C.).

226. *Aeronautics Act*, R.S.C. 1970, c. A-3.

227. See *The American Series of Foreign Penal Codes*, *supra*, note 18.

228. *Treacy* v. *D.P.P.*, *supra*, note 21.

APPENDIX A

Relevant Provisions of the Present *Criminal Code*

R.S.C. 1970, c. C-34 as amended through December 1982

Punishment

5. (1) Where an enactment creates an offence and authorizes a punishment to be imposed in respect thereof,

(*a*) a person shall be deemed not to be guilty of that offence until he is convicted thereof; and

(*b*) a person who is convicted of that offence is not liable to any punishment in respect thereof other than the punishment prescribed by this Act or by the enactment that creates the offence.

Offences outside of Canada

(2) Subject to this Act or any other Act of the Parliament of Canada, no person shall be convicted in Canada for an offence committed outside of Canada. 1953-54, c. 51, s. 5.

Offences committed on aircraft

6. (1) Notwithstanding anything in this Act or any other Act, every one who

(*a*) on or in respect of an aircraft

(i) registered in Canada under regulations made under the *Aeronautics Act*, or

(ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft registered in Canada under those regulations,

while the aircraft is in flight, or

(*b*) on any aircraft, while the aircraft is in flight if the flight terminated in Canada,

commits an act or omission in or outside Canada that if committed in Canada would be an offence punishable by indictment shall be deemed to have committed that act or omission in Canada.

(1.1) Notwithstanding this Act or any other Act, every one who

(*a*) on an aircraft, while the aircraft is in flight, commits an act or omission outside Canada that if committed in Canada or on an aircraft registered in Canada under regulations made under the *Aeronautics Act* would be an offence against section 76.1 or paragraph 76.2(*a*),

(*b*) in relation to an aircraft in service, commits an act or omission outside Canada that if committed in Canada would be an offence against any of paragraphs 76.2(*b*), (*c*) or (*e*), or

(*c*) in relation to an air navigation facility used in international air navigation, commits an act or omission outside Canada that if committed in Canada would be an offence against paragraph 76.2(*d*)

shall, if he is found anywhere in Canada, be deemed to have committed that act or omission in Canada. 1972, c. 13, s. 3(1).

(1.2) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission against the person of an internationally protected person or against any property referred to in section 387.1 (attack on official premises, etc.) used by him that if committed in Canada would be an offence against section 218 (murder), 219 (manslaughter), 245 (assault), 245.1 (assault with a weapon or causing bodily harm), 245.2 (aggravated assault), 245.3 (unlawfully causing bodily harm), 246.1 (sexual assault), 246.2 (sexual assault with a weapon, threats to a third party or causing bodily harm), 246.3 (aggravated sexual assault), 247 (kidnapping), 249 to 250.2 (abduction and detention of young persons) or 381.1 (threats against internationally protected persons) shall be deemed to commit that act or omission in Canada if

(*a*) the act or omission is committed on a ship registered pursuant to any Act of Parliament;

(*b*) the act or omission is committed on an aircraft

(i) registered in Canada under regulations made under the *Aeronautics Act*, or

(ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft in Canada under such regulations;

(*c*) the person who commits the act or omission is a Canadian citizen or is present in Canada; or

(*d*) the Act or omission is against

(i) a person who enjoys his status as an internationally protected person by virtue of the functions he exercises on behalf of Canada, or

(ii) a member of the family of a person described in subparagraph (i) who qualifies under paragraph (*b*) or (*d*) of the definition "internationally protected person" in section 2. 1974-75-76, c. 93, s. 3(1).

(2) Every one who, while employed as an employee within the meaning of the *Public Service Employment Act* in a place outside Canada, commits an act or omission in that place that is an offence under the laws of that place and that, if committed in Canada, would be an offence punishable by indictment, shall be deemed to have committed that act or omission in Canada.

(3) Where a person has committed an act or omission that is an offence by virtue of subsection (1), (1.1), (1.2) or (2), the offence is within the competence of and may be tried and punished by the court having jurisdiction in respect of similar offences in the territorial division where he is found in the same manner as if the offence had been committed in that territorial division.

(4) Where, as a result of committing an act or omission that is an offence by virtue of subsection (1), (1.1), (1.2) or (2), a person has been tried and convicted or acquitted outside Canada, he shall be deemed to have been tried and convicted or acquitted, as the case may be, in Canada. 1972, c. 13, s. 3(2); 1974-75-76, c. 93, s. 3(2).

(5) No proceedings shall be instituted under this section without the consent of the Attorney General of Canada if the accused is not a Canadian citizen.

(6) For the purposes of this section, of the definition "peace officer" in section 2 and of sections 76.1 and 76.2, "flight" means the act of flying or moving through the air and an aircraft shall be deemed to be in flight from the time when all external doors are closed following embarkation until the later of

(*a*) the time at which any such door is opened for the purpose of disembarkation; and (*b*) where the aircraft makes a forced landing in circumstances in which the owner or operator thereof or a person acting on behalf of either of them is not in control of the aircraft, the time at which control of the aircraft is restored to the owner or operator thereof or a person acting on behalf of either of them.

(7) For the purposes of this section and section 76.2, an aircraft shall be deemed to be in service from the time when pre-flight preparation of the aircraft by ground personnel or the crew thereof begins for a specific flight until

(*a*) the flight is cancelled before the aircraft is in flight,

(*b*) twenty-four hours after the aircraft, having commenced the flight, lands, or

(*c*) the aircraft, having commenced the flight, ceases to be in flight,

whichever is the latest. 1972, c. 13, s. 3(3).

Hijacking

76.1 Every one who, unlawfully, by force or threat thereof, or by any other form of intimidation, seizes or exercises control of an aircraft with intent

(*a*) to cause any person on board the aircraft to be confined or imprisoned against his will,

(*b*) to cause any person on board the aircraft to be transported against his will to any place other than the next scheduled place of landing of the aircraft,

(*c*) to hold any person on board the aircraft for ransom or to service against his will, or

(*d*) to cause the aircraft to deviate in a material respect from its flight plan,

is guilty of an indictable offence and is liable to imprisonment for life. 1972, c. 13, s. 6.

Endangering safety of aircraft in flight and rendering aircraft incapable of flight

76.2 Every one who,

(*a*) on board an aircraft in flight, commits an assault that is likely to endanger the safety of the aircraft,

(*b*) causes damage to an aircraft in service that renders the aircraft incapable of flight or that is likely to endanger the safety of the aircraft in flight,

(*c*) places or causes to be placed on board an aircraft in service anything that is likely to cause damage to the aircraft that will render it incapable of flight or that is likely to endanger the safety of the aircraft in flight,

(*d*) causes damages to or interferes with the operation of any air navigation facility where the damage or interference is likely to endanger the safety of an aircraft in flight, or

(*e*) endangers the safety of an aircraft in flight by communicating to any other person any information that he knows to be false,

is guilty of an indictable offence and is liable to imprisonment for life. 1972, c. 13, s. 6.

High treason

46. (1) Every one commits high treason who, in Canada,

(*a*) kills or attempts to kill Her Majesty, or does her any bodily harm tending to death or destruction, maims or wounds her, or imprisons or restrains her;

(*b*) levies war against Canada or does any act preparatory thereto; or

(*c*) assists an enemy at war with Canada, or any armed forces against whom Canadian Forces are engaged in hostilities whether or not a state of war exists between Canada and the country whose forces they are.

(2) Every one commits treason who, in Canada,

(*a*) uses force or violence for the purpose of overthrowing the government of Canada or a province;

(*b*) without lawful authority, communicates or makes available to an agent of a state other than Canada, military or scientific information or any sketch, plan, model, article, note or document of a military or scientific character that he knows or ought to know may be used by that state for a purpose prejudicial to the safety or defence of Canada;

(*c*) conspires with any person to commit high treason or to do anything mentioned in paragraph (*a*);

(*d*) forms an intention to do anything that is high treason or that is mentioned in paragraph (*a*) and manifests that intention by an overt act; or

(*e*) conspires with any person to do anything mentioned in paragraph (*b*) or forms an intention to do anything mentioned in paragraph (*b*) and manifests that intention by an overt act.

(3) Notwithstanding subsection (1) or (2), a Canadian citizen or a person who owes allegiance to Her Majesty in right of Canada,

(*a*) commits high treason if, while in or out of Canada, he does anything mentioned in subsection (1); or

(*b*) commits treason if, while in or out of Canada, he does anything mentioned in subsection (2).

(4) Where it is treason to conspire with any person, the act of conspiring is an overt act of treason. 1953-54, c. 51, s. 46; 1974-75-76, c. 105, s. 2.

Forgery of or uttering forged passport

58. (1) Every one who, while in or out of Canada,

(*a*) forges a passport, or

(*b*) knowing that a passport is forged

(i) uses, deals with or acts upon it, or

(ii) causes or attempts to cause any person to use, deal with, or act upon it, as if the passport were genuine,

is guilty of an indictable offence and is liable to imprisonment for fourteen years.

(2) Every one who, while in or out of Canada, for the purposes of procuring a passport for himself or any other person, makes a written or oral statement that he knows is false or misleading is guilty of an indictable offence and is liable to imprisonment for two years.

(3) Every one who without lawful excuse, the proof of which lies upon him, has in his possession a forged passport or a passport in respect of which an offence under subsection (2) has been committed is guilty of an indictable offence and is liable to imprisonment for five years.

(4) For the purposes of proceedings under this section

(*a*) the place where a passport was forged is not material; and

(*b*) the definition "false document" in section 282, section 324 and subsection 325(2) are applicable *mutatis mutandis*.

(5) In this section "passport" means a document issued by or under the authority of the Secretary of State for External Affairs for the purpose of identifying the holder thereof. 1968-69, c. 38, s. 4.

Fraudulent use of certificate of citizenship

59. (1) Every one who, while in or out of Canada,

(*a*) uses a certificate of citizenship or a certificate of naturalization for a fraudulent purpose, or (*b*) being a person to whom a certificate of citizenship or a certificate of naturalization has been granted, knowingly parts with the possession of that certificate with intent that it should be used for a fraudulent purpose,

is guilty of an indictable offence and is liable to imprisonment for two years.

(2) In this section, "certificate of citizenship" and, "certificate of naturalization," respectively, mean a certificate of citizenship and a certificate of naturalization as defined by the *Canadian Citizenship Act*. 1953-54, c. 51, s. 59; 1968-69, c. 38, s. 5.

Piracy by law of nations

75. (1) Every one commits piracy who does any act that, by the law of nations, is piracy.

(2) Every one who commits piracy while in or out of Canada is guilty of an indictable offence and is liable to imprisonment for life. 1953-54, c. 51, s. 75; 1974-75-76, c. 105, s. 3.

Piratical acts

76. Every one who, while in or out of Canada,

(*a*) steals a Canadian ship,

(*b*) steals or without lawful authority throws overboard, damages or destroys anything that is part of the cargo, supplies or fittings in a Canadian ship,

(*c*) does or attempts to do a mutinous act on a Canadian ship, or

(*d*) counsels or procures a person to do anything mentioned in paragraph (*a*), (*b*) or (*c*),

is guilty of an indictable offence and is liable to imprisonment for fourteen years. 1953-54, c. 51, s. 76.

Bigamy

254. (1) Every one commits bigamy who

(*a*) in Canada,

(i) being married, goes through a form of marriage with another person,

(ii) knowing that another person is married, goes through a form of marriage with that person, or

(iii) on the same day or simultaneously, goes through a form of marriage with more than one person; or

(*b*) being a Canadian citizen resident in Canada leaves Canada with intent to do anything mentioned in subparagraphs (*a*)(i) to (iii) and, pursuant thereto, does outside Canada anything mentioned in those subparagraphs in circumstances mentioned therein.

Conspiracy

423. (1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy, namely,

(*a*) every one who conspires with any one to commit murder or to cause another person to be murdered, whether in Canada or not, is guilty of an indictable offence and is liable to imprisonment for fourteen years;

(*b*) every one who conspires with any one to prosecute a person for an alleged offence, knowing that he did not commit that offence, is guilty of an indictable offence and is liable

(i) to imprisonment for ten years, if the alleged offence is one for which, upon conviction, that person would be liable to be sentenced to death or to imprisonment for life or for fourteen years, or

(ii) to imprisonment for five years, if the alleged offence is one for which, upon conviction, that person would be liable to imprisonment for less than fourteen years;

(*c*) repealed, 1980-81-82, c. 125, s. 23.

(*d*) every one who conspires with any one to commit an indictable offence not provided for in paragraph (*a*), (*b*) or (*c*) is guilty of an indictable offence and is liable to the same punishment as that to which an accused who is guilty of that offence would, upon conviction, be liable.

(2) Every one who conspires with any one

(*a*) to effect an unlawful purpose, or

(*b*) to effect a lawful purpose by unlawful means,

is guilty of an indictable offence and is liable to imprisonment for two years.

(3) Every one who, while in Canada, conspires with any one to do anything referred to in subsection (1) or (2) in a place outside Canada that is an offence under the laws of that place shall be deemed to have conspired to do in Canada that thing.

(4) Every one who, while in a place outside Canada, conspires with any one to do anything referred to in subsection (1) or (2) in Canada shall be deemed to have conspired in Canada to do that thing.

(5) Where a person has conspired to do anything that is an offence by virtue of subsection (3) or (4), the offence is within the competence of and may be tried and punished by the court having similar jurisdiction in respect of similar offences in the territorial division where he is found in the

same manner as if the offence had been committed in that territorial division.

(6) Where, as a result of a conspiracy that is an offence by virtue of subsection (3) or (4), a person has been tried and convicted or acquitted outside Canada, he shall be deemed to have been tried and convicted or acquitted, as the case may be, in Canada. 1953-54, c. 51, s. 408; 1974-75-76, c. 93, s. 36; 1980-81-82, c. 125, s. 23.

Master of ship maintaining discipline

44. The master or officer in command of a vessel on a voyage is justified in using as much force as he believes, on reasonable and probable grounds, is necessary for the purpose of maintaining good order and discipline on the vessel. 1953-54, c. 51, s. 44.

Seduction of female passengers on vessels

154. Every male person who, being the owner or master of, or employed on board a vessel, engaged in the carriage of passengers for hire, seduces, or by threats or by the exercise of his authority, has illicit sexual intercourse on board the vessel with a female passenger is guilty of an indictable offence and is liable to imprisonment for two years. 1953-54, c. 51, s. 146.

Navigating or operating a vessel with more than 80 mgs. of alcohol in blood

240.2 Every one who navigates or operates a vessel having consumed alcohol in such a quantity that the proportion thereof in his blood exceeds 80 milligrams of alcohol in 100 millilitres of blood, is guilty of an offence punishable on summary conviction. Add., 1972, c. 13, s. 20.

Sending or taking unseaworthy ship to sea

243. (1) Every one who sends or attempts to send or being the master knowingly takes a Canadian ship

(*a*) on a voyage from a place in Canada to any other place, whether that voyage is by sea or by coastal or inland waters, or

(*b*) on a voyage from a place on the inland waters of the United States to a place in Canada,

in an unseaworthy condition from any cause, and thereby endangers the life of any person, is guilty of an indictable offence and is liable to imprisonment for five years.

(2) An accused shall not be convicted of an offence under this section where he proves

(*a*) that he used all reasonable means to ensure that the ship was in a seaworthy state, or

(*b*) that to send or take the ship in that unseaworthy condition was, under the circumstances, reasonable and justifiable.

(3) No proceedings shall be instituted under this section without the consent in writing of the Attorney General of Canada. 1953-54, c. 51, s. 229.

APPENDIX B

Relevant Provisions of *Bill C-19, Criminal Law Reform Act, 1984*

5 ...

(3) Section 6 of the said Act [Criminal Code] is further amended by adding thereto, immediately after subsection (1.2) thereof, the following subsections :

"(1.3) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that if committed in Canada would be an offence against section 247.1 shall be deemed to commit that act or omission in Canada if

(*a*) the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament;

(*b*) the act or omission is committed on an aircraft

(i) registered in Canada under regulations made under the *Aeronautics Act*, or

(ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft in Canada under such regulations;

(*c*) the person who commits the act or omission

(i) is a Canadian citizen, or

(ii) is not a citizen of any state and ordinarily resides in Canada;

(*d*) the act or omission is committed with intent to induce Her Majesty in right of Canada or of a province to commit or cause to be committed any act or omission;

(*e*) a person taken hostage by the act or omission is a Canadian citizen; or

(*f*) the person who commits the act or omission is, after the commission thereof, present in Canada.

(1.4) Notwithstanding anything in this Act or any other Act, where

(*a*) a person, outside Canada, receives, has in his possession, uses, transfers the possession of, sends or delivers to any person, transports, alters, disposes of, disperses or abandons nuclear material and thereby

(i) causes or is likely to cause the death of, or serious bodily harm to, any person, or

(ii) causes or is likely to cause serious damage to, or destruction of, property, and

(*b*) the act or omission described in paragraph (*a*) would, if committed in Canada, be an offence against this Act,

that person shall be deemed to commit that act or omission in Canada if paragraph (1.7)(*a*), (*b*) or (*c*) applies in respect of the act or omission.

(1.5) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that if committed in Canada would constitute

(*a*) a conspiracy or an attempt to commit,

(*b*) being an accessory after the fact in relation to, or

(*c*) counselling in relation to,

an act or omission that is an offence by virtue of subsection (1.4) shall be deemed to commit the act or omission in Canada if paragraph (1.7)(*a*), (*b*) or (*c*) applies in respect of the act or omission.

(1.6) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that if committed in Canada would constitute an offence against, a conspiracy or an attempt to commit or being an accessory after the fact in relation to an offence against, or any counselling in relation to an offence against,

(*a*) section 294, 298, 303 or 338 in relation to nuclear material,

(*b*) section 305 in respect of a threat to commit an offence against section 294 or 303 in relation to nuclear material,

(*c*) section 381 in relation to a demand for nuclear material, or

(*d*) paragraph 243.5(1)(*a*) or (*b*) in respect of a threat to use nuclear material

shall be deemed to commit that act or omission in Canada if paragraph (1.7)(*a*), (*b*) or (*c*) applies in respect of the act or omission.

(1.7) For the purposes of subsections (1.4) to (1.6), a person shall be deemed to commit an act or omission in Canada if

(*a*) the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament;

(*b*) the act or omission is committed on an aircraft

(i) registered in Canada under regulations made under the *Aeronautics Act*, or

(ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft in Canada under such regulations; or

(*c*) the person who commits the act or omission is a Canadian citizen or is, after the act or omission has been committed, present in Canada.

(1.8) For the purposes of this section, "nuclear material" means

(*a*) plutonium, except plutonium with an isotopic concentration of plutonium-238 exceeding eighty per cent, (*b*) uranium-233,

(*c*) uranium containing uranium-233 or uranium-235 or both in such an amount that the abundance ratio of the sum of those isotopes to the isotope uranium-238 is greater than 0.72 per cent,

(*d*) uranium with an isotopic concentration equal to that occurring in nature, and

(*e*) any substance containing anything described in paragraphs (*a*) to (*d*),

but does not include uranium in the form of ore or ore-residue."

(4) Subsections 6(3) and (4) of the said Act are repealed and the following substituted therefor :

" (3) Where a person is alleged to have committed an act or omission that is an offence by virtue of this section, proceedings in respect of that offence may, whether or not that person is in Canada, be commenced in any territorial division in Canada and the accused may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.

(3.1) For greater certainty, the provisions of this Act relating to

(*a*) requirements that an accused appear at and be present during proceedings, and

(*b*) the exceptions to those requirements,

apply to proceedings commenced in any territorial division pursuant to subsection (3).

(4) Where a person is alleged to have committed an act or omission that is an offence by virtue of this section and that person has been tried and dealt with outside Canada in respect of the offence in such a manner that, if he had been tried and dealt with in Canada, he would be able to plead *autrefois acquit*, *autrefois convict* or pardon, he shall be deemed to have been so tried and dealt with in Canada."

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